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INTRODUCTION

This appeal is from an extraordinary judgment that threatens basic constitutional and common law rules governing relations between individuals, corporations and voluntary associations. Defendant, after leaving his position as archivist of plaintiff Church, obtained numerous highly confidential Church archives, converted them to his own unauthorized use and disseminated them to others. Plaintiffs brought this suit to regain possession--and protect the confidentiality and privacy--of those documents, and to obtain modest damages.

The court below found that plaintiffs had established prima facie cases of conversion, breach of fiduciary duty, intrusion into privacy, and breach of confidence. Rather than granting plaintiffs' prayers for injunctive relief and proceeding to assess damages, however, the trial court proceeded to transform this relatively simple conversion and intrusion upon privacy case into a heresy trial of plaintiffs' religion. The court permitted defendant to call as witnesses apostate Scientologists whose testimony had nothing to do with the dispute in issue, but rather with their own disputes with both the alleged actions and the religious beliefs, practices and doctrines of their former Church. The trial court ultimately wrote an opinion which not only denied plaintiffs the relief to which they were entitled, but gratuitously attacked the Church, the religion, and its Founder based upon the irrelevant, distorted and, in many instances, invented testimony of such witnesses.

The vehicle by which the trial court permitted the case to degenerate in the above-described manner was the court's adoption of defendant's defense that he was

justified in his conduct because he believed, whether correctly or not, that the documents might be useful to defend himself against a lawsuit he feared plaintiff would file, and against other unspecified retaliation. In furtherance of that defense, the trial court admitted into evidence, and ordered unsealed, the very documents whose privacy plaintiffs brought suit to protect. Finally, the trial court denied equitable relief on the ground that alleged abuses by plaintiffs--which had no connection with defendant or with the transaction at issue--constituted unclean hands.

The lower court's decision eviscerates fundamental principles and policies upon which basic rules of property, fiduciary, and privacy law are based. If upheld by this court, that decision will grant broad license to disaffected employees, business associates, clerks, family members and others unilaterally to seize, convert, and disclose highly confidential and private documents of any person or corporation, on the subjective belief that it will serve their personal advantage. It would also expand the doctrine of "unclean hands" to withdraw legal protection to persons and corporations who may have engaged in "unclean" acts irrespective of a nexus between those acts and the controversy at issue. By such means, the concept of "outlaw" would be reintroduced, thereby fostering self-help and reducing respect for and compliance with the law.

Anomalous results also flow from the lower court's conduct of the trial itself. If approved by this court, the lower court's trial rulings would send a message to parties aggrieved by intrusive and abusive conduct that the courts cannot protect their interests because the judiciary will order disclosure and

dissemination of the very confidential material for which legal protection is sought. Even by winning, such a plaintiff would be undone.

Both the procedure and the conclusions of the lower court are wrong under universally followed legal precedent. The trial court's novel and dangerous creation of new defenses and improper procedures must be rejected in the strongest terms. Equally, the trial court's gratuitous wholesale condemnation of the precepts and beliefs of an entire religion must be stricken.

Statement of the Case

Proceedings Below

Plaintiff Church, a religious organization, initiated this action on August 2, 1982. (App. 1). The Church alleged that defendant was a former staff member who had been assigned to a special "archives project," which involved maintaining various letters, documents, artifacts and other materials in plaintiff's possession concerning L. Ron Hubbard, the founder of the religion of Scientology. Some of the materials were to be made available to Omar Garrison, an author who had been retained by plaintiff to write an authorized biography of Mr. Hubbard, subject to limitations upon disclosure of information as directed by Mr. Hubbard or the plaintiff. Defendant assumed a fiduciary duty to maintain the confidentiality, privacy and physical integrity of the archives materials and of the information contained in them.

The Church further alleged that defendant worked on the project for two years, until December 1981, when defendant converted to his own use certain of the original archives materials, as well as photocopies made on church premises with church equipment and

materials while he was still a staff member; and that defendant disseminated those materials to unauthorized individuals.

The Church sought return of the documents, including all copies; preliminary and permanent injunctive relief against further dissemination or disclosure of the materials or the information; imposition of a constructive trust over the property and any profits that defendant may have received from his use of them; and damages for the cost to the Church of recovering the documents.

On August 3, 1982 the Church moved for a temporary restraining order and a preliminary injunction. (App. 20). The Church asserted that it was the rightful owner of the bulk of the documents taken by defendant, and that it was the rightful possessor, as bailee, of the remainder of the documents, which belonged either to Mr. Hubbard, or to his wife, Mary Sue Hubbard. On August 24, 1985, Superior Court Judge Cole issued a temporary restraining order requiring Armstrong to surrender the documents to the possession of the Clerk of the Superior Court, under seal, and providing that the documents could be viewed only by attorneys of record for use in the pending case. (App. 57). Judge Cole further restrained defendant from duplicating the documents or disclosing or disseminating them or the information contained in them. On September 24, 1982, the temporary restraining order was converted into a preliminary injunction. (App. 61).

On November 29, 1982, Mary Sue Hubbard was granted leave to file a complaint in intervention. (App. 64). She alleged that she retained an ownership or possessory interest in many of the documents taken by defendant, and that numerous documents were of a highly

private and personal nature relating to her or her husband, and were kept for safekeeping by the Church. She sought injunctive relief requiring return of the documents and prohibiting defendant from disseminating the documents or the information. She also sought damages for the invasion of her privacy.

Defendant Armstrong filed an answer to the Church's complaint on September 17, 1982, (App. 99), and an answer to Mrs. Hubbard's complaint on January 5, 1983. (App. 114). Defendant asserted, inter alia, that while working on the archives project he was not employed by the Church but rather by Mr. Hubbard, that the materials in question were either his property or Mr. Garrison's, that he was justified in taking and disseminating the materials to inform the public of certain facts about Mr. Hubbard and the Church, and that plaintiffs were barred from seeking injunctive relief pursuant to the "unclean hands doctrine" because of a "thirty-year history of criminal and tortious conduct . . ." having nothing to do with the defendant. On November 9, 1982, Superior Court Judge Frances Rothschild granted plaintiff's motion to strike defendant's unclean hands defense. (App. 127). A similar motion by intervenor, Mrs. Hubbard, was granted on February 1, 1983 by the Superior Court. (App. 151).

Mr. Armstrong also filed a counterclaim for damages against the plaintiff Church alleging, inter alia, fraud and intentional infliction of emotional distress. (App. 152). Following several demurrers, which were sustained with leave to amend, a third amended countercomplaint was severed from the underlying complaint. This was done so plaintiff could obtain an expedited trial on its complaint, which was not expected to encompass the broad factual and legal issues raised

by the counterclaim. (App. 184, 226). Accordingly, the countercomplaint was not tried and remains pending in the Superior Court.

On April 16, 1984 the case was assigned for trial to Superior Judge Paul G. Breckenridge, Jr. Plaintiffs presented motions in limine to prohibit defendant from introducing into evidence the content of the sealed archives documents on the grounds of irrelevance, privacy, hearsay and First Amendment. (App. 231, 237).1/ Plaintiffs emphasized that introduction of the documents into evidence would violate the very right of confidentiality and privacy which they sought to protect by bringing the action. Plaintiff also sought an order that the documents remain under seal during the trial and that the contents of the documents be discussed only in camera. (App. 241).

The court denied the motions in limine, on the basis of defendant's purported justification defense. (R.T. 125-135)2/ The court also granted defendant's motion for leave to amend his answers to allege the affirmative defense of unclean hands, (R.T. 325), despite the fact that that defense had been stricken three times in pretrial proceedings. (App. 127, 147, 151).3/

1/ Plaintiffs did not intend to, and did not, introduce the documents to prove their claims of conversion, breach of fiduciary duty and confidence, and intrusion into privacy. Rather, they intended to, and did, establish the confidential and private nature of the materials through the admissions of defendant in his deposition testimony. Plaintiffs were careful not to take steps which would compromise the privacy rights which they sought to protect.

2/ The court's shifting versions of that defense are described infra at 24-25.

3/ Following the court's ruling, plaintiffs moved for a (footnote continued)

Trial commenced on May 3. Plaintiffs called several witnesses, and introduced into evidence the deposition testimony of defendant and of Omar Garrison. At the conclusion of plaintiffs' case, defendant moved for a directed verdict. The court denied the motion, and ruled that plaintiffs had established, by a preponderance of the evidence, an intrusion on privacy, breach of confidence, breach of fiduciary duty and conversion by the defendant. (R.T. 1384).4/

Defendant called several witnesses, including himself. Defendant acknowledged his limited authority to use the materials, as well as the confidential and private nature of the materials. Defendant's case, directed primarily at proving his justification and unclean hands defenses, presented wide-ranging accusations about the life of Mr. Hubbard and the development of the plaintiff Church.

At the end of trial, the court entered into evidence and unsealed, over plaintiffs' objection on grounds of relevancy, hearsay, privacy, and First Amendment privilege, hundreds of documents taken by Armstrong. (R.T. 4555-690).5/

(footnote continued from previous page)
lengthy continuance of the trial to permit time for additional discovery and preparation to meet these substantial new defenses. (R.T. 340). A continuance of only a week was permitted (R.T. 392).

4/ The evidence establishing the elements of each of plaintiffs' claims is described infra at 9-14.

5/ Due to a series of appellate and collateral orders, however, the documents have remained under seal to this day. (App. 287-93).

On June 20, the court issued its Memorandum of Intended Decision, (App. 251), which was converted into a Statement of Decision on July 20. (App. 278). Judgment was entered August 10, 1984. (App. 279). Notice of Appeal was filed August 23, 1984. (App. 282).

The Court's Decision

In its Statement of Decision, (App. 251), the court found that plaintiffs established prima facie cases on their four claims, but denied any relief on the basis of defendant's justification and unclean hands defenses. The court formulated the justification defense as defendant's reasonable belief that he was threatened with harassing lawsuits and with physical danger. The court quoted, but did not discuss, five legal authorities in support of that formulation.

The trial court's decision vehemently denounced the character of Mr. and Mrs. Hubbard, but did not state which evidence in the trial record supported which defense as to which of the four causes of action. The court simply attached defendant's pre-trial Statement of Facts as an appendix to its Decision, again without citing--and apparently without regard to--evidence actually adduced at trial.

Statement of Facts

A. Plaintiffs' Case

1. Background of L. Ron Hubbard, the Church of Scientology, and the Archives Documents.

Plaintiff Church of Scientology of California is a non-profit California religious corporation. (R.T. 507). For eleven years, defendant was a member of the "Sea Organization," a fraternal religious order within the Scientology movement. (R.T. 508, 693).

Plaintiff Mary Sue Hubbard is the wife of L. Ron Hubbard, who is the Founder of the religion of Scientology, and the author of the scriptures of the Church. (R.T. 509). In February, 1980, he went into seclusion. Neither the Church nor Mrs. Hubbard knows his location. (R.T. 823).

The Hubbards were married in 1952. (R.T. 821). From 1969 until May, 1981, Mrs. Hubbard held the position of Controller for the Church of Scientology of California, with supervisory responsibility for the Church's temporal affairs. (R.T. 823).

2. Deposition Testimony of Gerald Armstrong.[6]

Defendant joined the Church of Scientology in 1969 when he enrolled in an introductory Scientology course. (R.T. 692). From 1971, he was a member of the Sea Organization and worked full time for Scientology until December 12, 1981, when he resigned his Church staff position and terminated his relationship with the Church. (R.T. 692, 693).

In January, 1980, he submitted a petition directed to L. Ron Hubbard, through plaintiff Church's organizational channels, asking that he be assigned "to handle research for your biography and related projects" and to gather and preserve "R [L. Ron Hubbard] val[uable] doc[uments] and writings." (Ex. F). The petition was approved, and Mr. Armstrong assumed the Church staff position[7] of LRH Personal Public Relations

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6/ Plaintiffs established all the elements of their causes of action through the deposition testimony of Gerald Armstrong, which was read into the record.

7/ Defendant claimed that he did not work for the Church, but rather worked directly for L. Ron Hubbard. Therefore, plaintiffs introduced disbursement vouchers for living expenses of Mr. Armstrong (R.T. 512-13, Ex. 6) and purchase orders issued by the Church for expenses (footnote continued)

Office Researcher.

Mr. Armstrong immediately began removing more than twenty boxes of material from storage on Church property at Gilman Hot Springs. These private materials, which related to the first years of the Hubbards' marriage and to Mr. Hubbard's life dating back to the 1920's, had been packed by Mrs. Hubbard in 1959, and were stored by the Church ever since. (R.T. 703-04, 824). Later, when Mrs. Hubbard was no longer on Scientology staff, Mr. Armstrong gathered private materials related to the Hubbard's lives during the 1960's; access to these materials had formerly been under the exclusive control of Mrs. Hubbard. (R.T. 707-10).8/ Finally, defendant obtained many of Mr. Hubbard's personal secretary files dating from the 1970's. (R.T. 707-08).9/

(footnote continued from previous page)
incurred by Mr. Armstrong for the archives project, (R.T. 516-17, Ex. 9), as well as documents showing he understood he worked for the Church. (Ex. 48, 54, R.T. 2196f.)

8/ Tom Vorm, who was responsible for the Controller's Archives, testified that he was very reluctant to give any materials to defendant, particularly because he was unable to reach Mrs. Hubbard for authorization. He allowed defendant to take documents only on the assurance that the materials were necessary to provide background information for the biography, that they would be used only for this purpose, that their privacy would be protected, and that the documents would be returned after Mr. Garrison was through with them. (R.T. 559-560).

9/ Defendant acknowledged that some of the archive materials belong to Mary Sue Hubbard. He also recognized that Mrs. Hubbard had authority to take anything from the archives that she desired and that no one other than the Hubbards had that right. (R.T. 719-20, 724-25).

The materials collected by Mr. Armstrong were considered extremely confidential by him and others in the Church, not only because they related to Scientology's Founder, but because they were personal and private. The materials included personal letters, diaries, self-analyses, journals, family memorabilia and financial documents. Rigorous precautions were taken to ensure their safety. (R.T. 736-38). Written policy, of which Mr. Armstrong was aware, required that all original Scientology archival materials be handled carefully and never be removed from archives. (R.T. 2281-83, Ex. 35). These original materials were invaluable documents for the history and development of Scientology as well as highly valuable in the commercial collector's market. (R.T. 1622, Ex. 36).

In October, 1980, Omar Garrison entered into a contract with AOSH DK Publications, a Scientology publishing company, to write an authorized draft biography of L. Ron Hubbard, the contents being subject to the final approval of Mr. and Mrs. Hubbard. (R.T. 722-23). The Church of Scientology assigned defendant to assist Mr. Garrison in these efforts. (R.T. 721-22). He thereupon began providing archives materials to Mr. Garrison. Defendant was fully aware that the confidential documents provided to Mr. Garrison were solely for purposes of preparation of the biography. (R.T. 724-25, 727-30).10/

After making a decision to leave the Church, but before actually departing on December 12, 1981, defendant copied as many as 10,000 pages of documents.

10/ Similarly, Mr. Garrison considered the documents confidential and provided only for biography use. His general practice in Scientology projects was to maintain the confidentiality of documents provided him and return them when the project was completed. (R.T. 1196-97).

(R.T. 743, 3270). Defendant left half these pages in the archives, and provided half to Mr. Garrison. Mr. Armstrong also took a great deal of original material. (R.T. 745-46).

After defendant left the Church, he became increasingly hostile toward it and Mr. Hubbard. At the end of April, 1982, defendant made contact with Michael J. Flynn, who was known to defendant as a Scientology antagonist and as the primary attorney handling over a dozen lawsuits against the Church and the Hubbards, claiming hundreds of millions of dollars in damages. In early May, 1982, defendant showed Flynn two of the archive documents, one of which was the original of a 1953 letter from Mrs. Hubbard to Mr. Hubbard, a letter defendant himself characterized as particularly private and personal. (R.T. 756-57).

In May, 1982, defendant prevailed upon Omar Garrison to provide him archives materials, so that he could use them as "evidence" in an unnamed lawsuit he anticipated with the Church, although he had not been sued by the Church and had no idea what he might be sued for. (R.T. 760). In fact, defendant admitted that his purpose was to acquire materials to turn over to Mr. Flynn for use in other litigation against the Church and the Hubbards;[11]/ this is exactly what he did between May

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11/ Indeed, subsequent to the trial in this case, evidence was uncovered and introduced in the court below in connection with Armstrong's counter-claim, demonstrating that Armstrong was planning to orchestrate a coup within the Church by instigating a group of purportedly disaffected church members to file a lawsuit, drafted by Flynn, designed to place all church assets in receivership. Armstrong expected that the newly installed "leadership" would then settle all of Flynn's cases, including his own counter-claim for $60,000,000. See affidavit of John G. Peterson on file with the Superior Court below, a copy of which is in the appendix. (App. 294.

and August, 1982. (R.T. 4579, 764-65, 771-72).

In late May, 1982, at the Bonaventure Hotel in Los Angeles, defendant presented to Mr. Flynn thousands of pages of private and personal archives materials, both originals and copies, including private naval records and Mr. Hubbard's private diaries dating from the mid-forties.12/ (R.T. 776-78). Several former Scientologists, now hostile to the Church, were also present and examined the materials.13/ (R.T. 769). Mr. Armstrong told Mr. Flynn and others that the archives materials were potential evidence in Mr. Flynn's litigation against the Church and the Hubbards (R.T. 770-71).

Thereafter, defendant began sending Mr. Flynn archives materials in large quantities. Between June and August, he sent 3000 pages of original archives materials and 5000 pages of copies of archives materials. (R.T. 722). He also sent about 2000 pages of original archives and 400 pages of copies to local attorneys associated with Mr. Flynn. (R.T. 773-774). Indeed, defendant continued the process after the instant lawsuit was filed. (R.T. 779).

Defendant acknowledged that the archives documents which he misappropriated were private, personal and confidential; that he had no authorization to use them as he had; and that he did not believe that either Mr. or Mrs. Hubbard would ever have approved of the use he made of them. (R.T. 724-32, 765).

12/ These diaries were so exceptionally private that the trial court refused to allow them into evidence. (R.T. 4602-3).

13/ Defendant also showed the private journals and other materials to third parties on other occasions. (R.T. 752-54, 795-97).

3. Additional Plaintiffs' Evidence

a. Throughout his Scientology career, including while he was archivist, defendant was an employee of and paid by the Church. (R.T. 512-17).

b. Omar Garrison made no claim to have the right of possession of any archives materials. (R.T. 1254-55)

c. Letter demand was made on defendant on May 26 and 27, 1982 to return all archives, but he denied having them. (R.T. 1147, 1149; Ex. 17, 18, 19). Defendant's own subsequent testimony showed that he indeed did possess the documents on those dates. (R.T. 756-797).

d. The Church, through its counsel, retained a private investigator's firm to determine what materials defendant had. The investigation was terminated upon defendant's delivery of the materials to the Superior Court, pursuant to the temporary restraining order. (R.T. 1151-152). The Church incurred substantial monetary loss by having to retain investigators. (R.T. 1151-1152, Ex. 21).

e. Mary Sue Hubbard did not consent to defendant's acquisition and dissemination of personal materials of fifty years of her husband's and her lives. She considered his conduct an outrageous intrusion into her and her husband's private lives. (R.T. 843-44).

B. Defendant's Case

In his defense case, defendant contested factually only two parts of the plaintiffs' case. He claimed (1) that he had not been a Church employee, but rather L. Ron Hubbard's, and (2) that Mrs. Hubbard was aware that as archivist he was gathering personal materials (but he did not claim she was aware of or consented to his post-Church activities). The bulk of

defendant's case was a presentation of why he was "justified" in taking the documents and why the Church and Mrs. Hubbard had unclean hands. Defendant's testimony--which filled nine trial days--amounted to a litany of Mr. Armstrong's regrets for his years in Scientology, and opinions he now held about how Scientology and Mr. Hubbard misled and mistreated people.

The trial court also permitted other former Scientologists to testify about their experiences with Scientology, even where those experiences were unknown to, and unconnected with, Mr. Armstrong. The court admitted this testimony, as well as a vast range of hearsay testimony, on the theory that it was relevant to establishing Mr. Armstrong's state of mind. The trial court's decision extensively and explicitly relied on the truth of such testimony although it had not been admitted for its truth.14/

1. Defendant's Testimony

a. The Archive Assignment

Defendant's petition to become archivist cited his "fabulous personal gains and success" from Scientology and concluded that "this is the best way I can serve [L. Ron Hubbard]." (Ex. F).

14/ The trial court's strained efforts to vouch for the credibility of the apostate witnesses has been rendered nugatory. Subsequent to the trial in this case, several of defendant's witnesses have been shown to have given untruthful and inaccurate testimony in the trial of this case. See Declaration of John Peterson (App. 294). Indeed, one witness in particular, Howard Schomer, admitted in subsequent testimony in another case that he had falsely suggested in his testimony in this case that he possessed Church documents which corroborated his testimony about Church financial affairs. Schomer further admitted that he asked the Church for $200,000 as the price for not testifying in the Armstrong case, an offer which the Church of course refused to consider. Id. (App. 294).

Sometime after he assumed his position, his superiors noticed that defendant's performance was unsatisfactory and that he appeared to be increasingly hostile to the Church and to Mr. Hubbard. On November 24, 1981, a senior staff member requested defendant to discuss these matters, and to follow a non-confidential Church procedure to determine whether he felt unacknowledged hostility to Scientology. Although defendant refused these requests he testified that he considered them an attack on him, and concluded that people were trying to take over the biography project and that Scientology was "nothing but an intelligence organization." (R.T. 1678-79).

Despite defendant's hostility to the Church, he formally maintained his Scientology post in order to get the archives materials--which defendant felt were damaging to Mr. Hubbard and the Church--out of the Church and to Mr. Garrison, where defendant believed he would have access to them. (R.T. 1681, 2286). In the weeks before leaving the Church, defendant copied the same number of documents as he had copied the whole previous year. (R.T. 1653). Finally, he moved his belongings from his room in the Scientology complex, took thousands of pages of original archives materials which he had been unable to copy, and on December 12, 1981, left a note that he had left the Church. (R.T. 1680).

b. Defendant's Activities After Leaving the Church.

Defendant tried to justify taking the documents for his own use and providing them to others on the basis of his purported fear of lawsuits and other retaliation by the Church.15/

15/ Aside from the circularity of his testimony--he (footnote continued)

He placed great weight on the fact that he was the subject of a Scientology "declare," which is a document setting forth that a parishioner is in bad standing with the Church because of violations of Church policy. The first "declare," which was issued in February, 1982, but which defendant learned of toward the end of April, noted that defendant had showed hostility toward Scientology and senior Scientologists, and had not followed proper procedure in leaving his post. (R.T. 1699, Ex. PP).

Defendant claimed that the "declare" meant that he was automatically subject to a purported Church policy (the "fair game doctrine") allowing him to be harrassed. (R.T. 1705).16/ But the only incident which he was able to raise as purported evidence of "fair game" prior to his unauthorized acquisition and delivery of the documents was a minor dispute with the Church over possession of some photographs. In April 1982, an independent dealer in L. Ron Hubbard memorabilia delivered to the Church a set of photographs of

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(footnote continued from previous page)
took the documents to prevent retaliation for his taking the documents--Armstrong admitted that he voluntarily returned to the Church on various occasions and voluntarily had several meetings with Scientology representatives at or near the Church's Los Angeles facilities. (R.T. 1698, 2304-05, 2319, 2324).

16/ The meaning and existence of "fair game" was the subject of considerable testimony at trial, with defendant and his witnesses claiming that his version of the policy was accurate, and with rebuttal witnesses, including an expert on religion, explaining that it was a religious doctrine denying Scientology antagonists access to the internal Scientology justice system, which operates analogously to that of the role of the traditional Jewish rabbinate in resolving legal disputes between Jews. In any event, the Church demonstrated that the policy was revoked in 1969 (Ex. AAAA, R.T. 3361-93 and passim).

defendant's wedding and another set of photographs that had been taken from the Church by other former Scientologists. The Church returned the wedding photographs to defendant, but retained the other photographs on a bona fide claim of rightful possession. (R.T. 2926, 4253-55). After defendant made extremely hostile and vehement demands for return of all the photographs,17/ his former wife told him that he should get a lawyer if he wanted to pursue the matter. (R.T. 1713-14, 4258).

Although there was no physical abuse or threat in this exchange, defendant claimed that this single incident led him to fear for his present wife's safety. (R.T. 1715). He decided to "confront" the Church, and contacted Michael Flynn a day or two later. (R.T. 1715).18/

The only other incident that defendant claimed demonstrated wrongful conduct against him--alleged "harassment" by the Church's private investigators who

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17/ Defendant intended to sell the photographs commercially for several hundred dollars. (App. 275).

18/ According to both defendant's pretrial declaration and the Statement of Facts in his trial brief--adopted by the trial court--he learned of a second "declare" in late May, after the Bonaventure meetings and after seeing Mr. Garrison to acquire more documents. (R.T. 2386) At trial, defendant changed his story in an attempt to conform the facts to his new theory that he needed the documents to defend himself against the charges in the second "declare"--he now claimed that he knew of the second declare at an earlier date. (R.T. 1723). In any event, he pointed to no conduct by the Church prior to acquiring and delivering the documents except the photograph controversy described above. And, neither scenario constitutes a legal justification for his conduct. See Argument I, infra.

were seeking information as to the stolen archives--occurred after he had already delivered all of the documents. (R.T. 2446).19/

c. Defendant's Testimony Concerning The Documents He Took.

Defendant testified for two days about a small portion of the documents that he took. At the explicit suggestion of the trial court about how to frame his defense and how to testify about the documents, (R.T. 1799), defendant stated that he took each document based on his subjective belief that it would be useful in his "defense" of an unspecified lawsuit he feared the Church would file against him.20/ That belief was purportedly based on his further belief that various documents showed that the Church and/or Mr. Hubbard had misrepresented Mr. Hubbard's background, accomplishments, and

19/ In any event, the evidence as to whether the investigators in fact harassed defendant is, at best, confusing. By defendant's own testimony, on one occasion, he ran up to the investigator's car and began taking their pictures (R.T. 1728); on a second, in order to prevent them from driving away he put his leg in front of their car (R.T. 1726, 2448). As to the third occasion, defendant first testified that he ran after the investigator's car, which swerved and struck him on the elbow, but later testified that he struck the car. (R.T. 2452).

20/ Defendant presented and testified about only 20-25% of the documents that he took. On cross-examination, plaintiffs, after making clear that they were doing so only because the court, over their objection, had allowed testimony concerning the documents, cross-examined defendant with about 50 further documents for the purpose of establishing that his rationale for taking the documents did not even colorably explain the whole body of materials. In order to preserve the documents' privacy, plaintiffs did not present the remaining documents, nor did defendant (presumably because their scope and breadth undermined his defense).

role in the Church.21/ Defendant admitted, however, that he knew of no present or planned lawsuit in which such matters would be raised. (R.T. 2371).

2. Testimony of Other Defense Witnesses.

The testimony of defendant's nonparty defense witnesses related, first, to Mr. Armstrong's state of mind after leaving the Church, and, second, to purported bad practices by the Church.

Omar Garrison, Nancy Dincalci, and Joyce Armstrong testified that defendant from the time he left the Church, was "mentally crippled," completely preoccupied with his hostility toward the Church and unable to get a job or function normally, (R.T. 3692), "violently" disturbed, (R.T. 3607), "virtually incoherent," "maniacal," (R.T. 3642), "disturbed," and "confused." (R.T. 3534). This testimony established that defendant's extreme hostility toward the Church existed from the time he left the Church, long before the late April dispute over the photographs, which defendant claimed justified his conduct.22/

Defense witnesses also testified to a variety of alleged bad practices by the Church.23/ The trial court admitted this testimony--much of which was hearsay--on the ground that it was corroborative of

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21/ This testimony is described infra at 91 n. 64.

The trial court repeatedly and explicitly ruled that defendant's justification defense rested only on defendant's subjective belief that the documents would be useful in defense of unspecified litigation or harassment. On a number of occasions, the trial court ruled that the actual truth or falsity of plaintiffs' alleged misrepresentations and abuses was not on trial. (e.g., R.T. 1799, 1805, 4602).

22/ The testimony also significantly undercuts the credibility of Armstrong as a witness.

23/ This testimony is described infra at 93, n. 66.

defendant's state of mind, even though defendant had no knowledge of these purported facts when he took the documents.

C. REBUTTAL CASE

On rebuttal, the testimony of Dr. Frank Flinn, an expert on new religious movements,24/ addressed three points: first, that the "fair game" doctrine was uniformly understood by Scientologist to have a meaning similar to that of the excommunication policies of other faiths--that is, that the former adherent is denied the protections and services of the Church (R.T. 4079-80); second, that a defining feature of genuine religious movements is the phenomenon of hagiography, in which religious believers mythologize the powers and achievements of their leaders (R.T. 4045; 4087-94); and, third, that Mr. Hubbard's ecclesiastical position--and spiritual authority--as Founder of the religion was consistent with the fact that he held no corporate management position and no civil legal authority in the Church. (R.T. 4046ff).25/

D. SURREBUTTAL

Mr. Armstrong called several surrebuttal witnesses who gave cumulative testimony, including Howard Schomer, who later admitted that a significant portion of his testimony was false. See supra at 15 n. 14.

24/ Dr. Flinn, a Roman Catholic Scholar, is the senior religious editor of Adwin Mellen Press of Toronto and New York. He received his undergraduate degree from the Harvard Divinity School and his Ph.D. from the University of Toronto. Dr. Flynn has written extensively on the rise of new religious movements, including a detailed study of Scientology.

25/ On rebuttal, plaintiffs also presented a variety of evidence responding to the defense witnesses' characterizations of their experiences in Scientology.

ARGUMENT

INTRODUCTION AND SUMMARY

The trial court ruled that plaintiffs established prima facie cases of invasion of privacy, breach of fiduciary duty, breach of confidence, and conversion. The court's grant of judgment to defendant rested solely on a chain of erroneous rulings of law. Each link in that chain compounded the previous error.

a. The court's core error was its creation of new common law defenses based on defendant's purported subjective belief that it was to his personal advantage to appropriate plaintiffs' private and confidential documents. These defenses find no precedent in the courts of California, the other forty-nine states, or the federal judiciary. The perverse practical implications of permitting fiduciaries to purloin and disseminate private papers on their unilateral belief that it will protect their personal interests is patent.

b. Even if the trial court's new defenses had any application to plaintiffs' claim for modest monetary damages, they are by definition inapplicable to the central remedy sought by plaintiffs--namely, equitable relief to prevent defendant's continued exploitation of the private documents. Those defenses at most permitted defendant to protect his interests under emergency circumstances that afforded defendant no opportunity to resort to judicial remedies to protect those interests. The record shows indisputably that there never was such an emergency. But even if there was an emergency when defendant took the documents, there was none at the time of trial and there is none now. Defendant patently has had time to resort to judicial procedures and indeed has

already done so. Hence there is no defense to the ongoing and future harm for which equitable relief is the sole proper remedy.

c. Nor does the defense of unclean hands bar equitable relief. That defense is applicable only when a plaintiff has committed willful misconduct and only when such conduct directly taints the transaction as to which the plaintiff seeks redress. Neither of these elements was established by defendant in this case. The only acts taken by the Church to obtain the return of the documents were to instruct its counsel to hire a private investigator to determine their whereabouts by legal means, and to bring this lawsuit. Intervenor's only act was to intervene in this case.

d. The trial court's erroneous creation of subjective justification defenses was compounded by the court's admission and subsequent unsealing of the very documents whose privacy plaintiffs sought to ensure. These rulings--defying the precedent of legions of decisions--constituted fresh infringements of the constitutional right to privacy that plaintiffs came to court to safeguard. Far from providing a meaningful remedy for defendant's wrong, the court exacerbated the harm. The private documents should be sealed.

e. The trial court's substantive legal errors were further compounded by massive evidentiary errors. The bulk of evidence adduced by defendant was (1) hearsay evidence introduced solely to prove defendant's state of mind and (2) evidence of alleged abuses committed by plaintiff against third parties, also introduced to prove defendant's state of mind. The trial court improperly considered the former evidence for its truth. And the latter evidence was patently irrelevant to defendant's state of mind because it was

indisputably unknown to him at the time he took the private documents. These massive evidentiary errors unquestionably affected the outcome of the case. Therefore, even if the defenses were valid, these evidentiary errors require a new trial.

POINT I

THE TRIAL COURT'S JUDGMENT RESTED ON DEFENSES THAT, AS A MATTER OF LAW, ARE INAPPLICABLE TO ANY OF THE FOUR CAUSES OF ACTION AS TO WHICH PLAINTIFFS ESTABLISHED UNREBUTTED PRIMA FACIE CASES

INTRODUCTION

The trial court ruled that at trial plaintiffs established prima facie cases of invasion of privacy, breach of fiduciary duty, breach of confidence, and conversion. The court's grant of judgment to defendant rested solely on the court's creation of new common law defenses--defenses for which there is no precedent in the case law of the courts of California nor, indeed, in any decision rendered by the courts of the other forty-nine states or the federal judiciary.

The discussion in this Point details the specific doctrinal errors that, in themselves, fatally infect the trial court's novel defenses. Those specific errors, however, reflect deeper anomalies and confusions in the trial court's procedure, in its substantive legal analysis, and in the practical implications of its decision. This Introduction sets forth these three deeper errors.

a. On the eve of trial, the trial court ruled, for the first time, that defendant could raise a sweeping justification defense to plaintiffs' claims. The trial court stated the defenses as follows:

> "So, it seems to me, that we have to be concerned, I suppose, with the reasons which the defendant has asserted [as] to why he turned these documents over to

> third persons or a third party, and it seems to me that [if] he had a reasonable good faith belief that this is evidence of a crime or criminal conduct, that [sic] he would be justified in turning it over to a third person." (R.T. 130).

Consistent with this statement of a subjective standard of justification, the bulk of evidence adduced by defendant at trial was admitted by the trial court solely to show defendant's state of mind.26/ After trial, the trial court's decision rested on defendant's purported subjective justification. That subjective justification, however, was no longer defendant's belief that he was exposing crime but rather that he was threatened with lawsuits and other unspecified retaliation. Thus, the trial court created an ill-defined, sweeping, subjective defense on the eve of trial and, during and after trial, fundamentally altered the substance of that defense.

b. Apart from the procedural confusion in the court's last minute creation and after-trial reshaping of the justification defense, that novel defense--in each of the trial court's shifting versions of it--appears to rest on a fundamental misunderstanding about the proper application of defenses to distinct causes of action.

The trial court's legal analysis, in its entirety, consisted of a recital of two sections of the Restatement (Second) of Agency, two sections of the Restatement (Second)

26/ The trial court repeatedly and explicitly ruled that defendant's justification defense rested only on defendant's subjective belief that the documents would be useful in defense of unspecified litigation or harassment. On a number of occasions, the trial court ruled that the actual truth or falsity of plaintiffs' alleged misrepresentations and abuses was not on trial. (e.g., R.T. 1799, 1805, 4602).

That the trial court erroneously considered this evidence for purposes other than for showing defendant's state of mind, and that this evidentiary error constitutes a miscarriage of justice requiring a new trial, are discussed in Point V of this Brief.

of Torts, and one forty year-old California Court of Appeal decision. The court, however, did not state which of its findings of fact were meant to support which of the defenses contained in those legal authorities. Nor did the court state which of those defenses applied to which of the four prima facie claims established by plaintiffs.

To the extent that the court, drawing on those disparate legal authorities, intended to fashion a single "justification" defense applicable to all four causes of action, its analysis is erroneous. Each of those legal authorities, by its own terms, is applicable only to a single cause of action.27/ That is, even if an authority cited gives defendant a valid defense to one of the four claims, this does not defeat the other three claims. It is defendant's burden to establish a distinct defense for each of the four causes of action.

The discussion below therefore attempts to give the most legally coherent reading to the trial court's decision by identifying the findings of fact and legal authorities that conceivably pertain to each of the four causes of

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27/ Thus, Sections 395 and 418 of the Restatement (Second) of Agency, and Willig v. Gold, 75 Cal.App.2d 809, 814 (1946), by their own terms, state defenses only to a claim of an agent's breach of fiduciary duty. Likewise, Section 261 of the Restatement (Second) of Torts explicitly applies only to a claim of trespass or conversion; and Section 652A of the Restatement (Second) of Torts explicitly applies only to an invasion of privacy claim. (The court cited no legal authority supporting a defense to plaintiffs' breach of confidence claim.) It is no surprise that these legal authorities state defenses applicable to individual causes of actions, rather than defenses generally applicable to all tort claims. Each cause of action rests on particular interests and policies; the corresponding defenses therefore signify specific exceptions to judicial protection of those particular interests and policies, as shown by the Restatement comments and case law discussed in detail below.

action. As that discussion shows, the court's justification defenses find no support in the legal authorities that are pertinent to any of those causes of action.

c. The practical result of the trial court's new defenses is perverse in four ways: First, plaintiffs are divested of extremely private and highly valuable documents which they indisputably own and/or are rightfully entitled to possess. Second, the new defenses grant to a fiduciary--indeed, a fiduciary occupying the most sensitive, confidential relationship to appellants--the power to assert control over such documents and information solely on the basis of his subjective belief that it will serve his personal advantage. Third, the new defenses permit a fiduciary to exercise that power unilaterally and without prior judicial review, even though there is no dispute that the fiduciary had time to resort to judicial process before infringing on plaintiffs' fundamental--indeed, constitutionally protected--personal and property rights. And, fourth, the new defenses permit a fiduciary unilaterally to seize the private material on his belief that it is, rather than the instrumentality or fruits of actual crime, merely indirect evidence of alleged wrongdoings that might be helpful to defendant in his defense of unspecified future litigation.

In short, the trial court permits one who occupies a highly sensitive fiduciary position to seize extremely personal, private documents and information, under circumstances in which even an authorized law enforcement officer would not be permitted to seize even non-confidential instrumentalities of crime--that is, under circumstances in which there is indisputably no necessity for action without resort to prior judicial authorization.

The practical impact of such a new common law rule on individuals and on the operation of institutions, both commercial and non-commercial, is hard to overestimate. The

facts of this case, of course, illustrate the point. The Church appointed defendant, a long-time devotee, to one of the most sensitive fiduciary positions within the Church--that is, custodian of the most private, personal archives of the Church's founder. After becoming disillusioned with, and taking an adversarial stance against the Church, defendant appropriated a large part of those archives on his ostensible belief that they might serve as evidence in unspecified future litigation or as some kind of shield against unspecified future wrongdoing by the Church. To permit such conduct is to place the fundamental privacy and property rights of all employers at the mercy of the subjective discretion and passion of disgruntled employees.

A. The Trial Court's Creation of a Justification Defense Against Plaintiffs' Invasion of Privacy Claim Stems From a Flatly Erroneous Interpretation of the Prima Facie Elements of Such a Claim.

1. The Prima Facie Elements of An "Intrusion Upon Seclusion" Claim Were Established

The trial court found that a prima facie case of invasion of privacy was established. Indeed, the facts found by the court indisputably establish such a claim both under the traditional common law standards adopted by the California courts and under the broader protections of privacy enshrined since 1972 in the California Constitution.

In the leading case applying the California common law of "intrusion" upon privacy, defendant's agents, without plaintiff's consent, made photographs and recordings of plaintiff in his den, engaged in the allegedly fraudulent practice of medicine. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). The court concluded that California's law of invasion of privacy includes "instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably

expect that the particular defendant should be excluded," and that defendant's conduct constituted such an intrusion. Id. at 249. (Quoting Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969)). The Restatement (Second) of Torts § 652B similarly defines the tort of "intrusion upon seclusion" as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

There is no question that the facts of this case, as found by the trial court, establish the elements of the tort of intrusion: The documents in question were conceded by defendant to be private and personal; and defendant's unauthorized assumption of control over such deeply private documents would unquestionably violate the expectations--and offend the sensibilities--of the ordinary, reasonable man. That the documents at issue--personal letters, diaries, self-analyses, journals, family memorabilia, financial documents, documents tracing the personal growth of a religion's founder over the course of years--are private materials hardly requires discussion. Indeed, defendant has repeatedly admitted as much.

Numerous courts have affirmed the peculiarly private nature of personal papers. In the early case of Boyd v. United States, 116 U.S. 616, 627-28 (1886), the Supreme Court quoted Lord Camden's statement that:

> "[p]apers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of trespass, yet where private papers are removed and carried away the secret nature of those goods

> will be an aggravation of the trespass, and demand more considerable damages in that respect."

More recently, in Fisher v. United States, 425 U.S. 391, 427 (1976), Justice Brennan's concurring opinion affirmed that personal papers "constitute an integral aspect of a person's private enclave." And in Nixon v. Administrator of General Services, 433 U.S. 425, 459, 465 (1977), the Court found that former President Nixon's "private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files" were subject to "a legitimate expectation of privacy."

California courts have also recognized that personal papers and personal information lie at the heart of the privacy protected at common law. In City of Carmel-by-the-Sea v. Young, 2 Cal.3d 259, 268, 85 Cal.Rptr. 1 (1970), the court ruled that one's personal documents--as well as those of one's spouse and children--are within the legitimate zone of common law privacy. Indeed, in United States v. Hubbard, 650 F.2d 293, 305-307 (D.C. Cir. 1980), the court, applying California law, found that the Church of Scientology could assert a state privacy interest--on behalf of itself and its members--as to a large body of internal church documents seized by the government.28/

28/ The Hubbard case thus clearly establishes the Church's standing to assert a claim of privacy--on behalf of itself and its members--as to Church archives. Because the Church possessed the archives as baillee of L. Ron Hubbard and Mary Sue Hubbard, the Church is also entitled to--indeed, the Church has a duty to--assert the Hubbards's privacy interest as well. "The custodian (of private information) has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of (it) is entitled to expect that his right will be thus asserted." Board of Trustees v. Superior Court, 119 Cal.App. 3d 516, 174 Cal.Rptr. 160 (1981) (quoting Craig v. Municipal Court, 100

(footnote continued)

There can thus be no question that under California law the documents in question fall within the zone of privacy "from which an ordinary man in plaintiffs' position could reasonably expect that the particular defendant should be excluded." Dietemann, 449 F.2d at 249. Equally, under the Restatement standard it is unquestionable that the unauthorized assumption of control over personal documents "would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B. Indeed, Comment b to Section 652B states explicitly that an "intrusion upon seclusion" claim arises from unauthorized interference with "private and personal mail" and with other "personal documents."

Defendant intrusively acquired the private documents by removing them from the Church in December 1981, and by retrieving them from Omar Garrison's storage in the spring/summer of 1982, with the intent of using them for his own purposes. Thus, the trial court explicitly found that defendant took the documents from Mr. Garrison in order to deliver them to Mr. Flynn and others. (App. 254). While the trial court found that Mr. Garrison purported to give permission to defendant to take the documents (id.), there is no dispute that both Mr. Garrison and defendant were aware that they were authorized to use the documents only for purposes of preparing the biography of Mr. Hubbard. See Statement of Facts, supra at 9-14. Indeed, the trial court found that defendant's use of the documents was for purposes other than the "certain specific purposes" that had been authorized. (App. 254) Thus, notwithstanding Mr. Garrison's

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Cal.App. 3d 69, 77, 161 Cal.Rptr. 19 (1979) (court's parentheticals); see also Socialist Workers Party v. Attorney General, 463 F. Supp. 515, 525 (S.D.N.Y. 1978) (unincorporated association has standing to bring intrusion claim).

purported grant of "permission,"29/ defendant's acquisition of the documents for unauthorized purposes was a wrongful intrusion.

But even if defendant's physical acquisition of the documents had been authorized, his later retention of control over them, including his assertion of the power to grant others access to them, fits securely within the definition of intrusion. The Restatement (Second) of Torts states that an intrusion claim consists of "an intentional interference with [plaintiff's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns," and that such intentional interference may occur "physically or otherwise." Section 652B, and Comment a (emphasis added). Numerous courts have adopted the rule that both physical and non-physical interferences with a person's control over others' access to his private information may constitute tortious intrusions. E.g. Dietemann v. Time, 449 F.2d at 249; Pearson v. Dodd, 410 F.2d at 704; Rogers v. Loews, 526 F.Supp. 523, 528 (D.D.C. 1981); Sofka v. Thal, 662 S.W.2d 502, 510 (Mo. 1983); Oliver v. Pacific Northwest, 632 P.2d 1295, 1298 (Or.App. 1981); Lamberto v. Bown, 326 N.W.2d 305, 309 (Iowa 1982); Froelich v. Adair, 516 P.2d 993, 995 (Kan. 1983).

In Phillips v. Smalley Maintenance Services, 435 So.2d 705, 709 (Ala. 1983), the court ruled that wrongful acquisition of information is not a necessary element of a claim for intrusion. The court stated that interference with one's "personality" or "psychological integrity" may be as intrusive as interference with a "physically defined area or place," and that "[o]ne's emotional sanctum is certainly due the same expectations of privacy as one's physical environ-

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29/ Mr. Garrison testified that he did not intend to give permission for the wholesale taking of documents undertaken by Armstrong, or for the purposes to which Armstrong put them to use (R.T. 1347-50).

ment." Id. at 710, 711. Defendant's arrogation of control over, and his assertion of the right to grant others access to private documents, clearly constitute incursions on the "psychological integrity" and "emotional sanct[ity]" of plaintiffs' private concerns. Hence, in Pearson v. Dodd, 410 F.2d at 704-5, the court assumed that plaintiff's employees, whose physical access to certain confidential files was authorized, nonetheless committed an intrusion when they asserted control of the files "with the intent to show them to unauthorized outsiders." This precisely characterizes defendant's wrongdoing.

Indeed, in the Dietemann case itself, the court conceded that defendants' physical presence in plaintiff's den was authorized and, therefore, that defendants had a right to see and hear, and to tell others what they saw and heard. 449 F.2d at 249. Defendants' intrusion, rather, consisted of their making photographs and recordings with the intent of later publication. Analogously, in this case, even if defendant lawfully had physical access to the documents, his assertion of control over them, including his photo-copying of them, with the intent to give them to third parties, constitutes common law intrusion.

Thus, the trial court's ruling that a prima facie invasion of privacy claim was established is fully supported by settled common law doctrine. It is supported a fortiori by the 1972 Amendment to the California Constitution, which was "intended to be an expansion of the [common law] privacy right." Porten v. University of San Francisco, 64 Cal.App. 3d 825, 829, 134 Cal.Rptr. 839 (1976). That Amendment added the right of "privacy" to the "inalienable rights" enshrined in Article 1, § 1 of the Constitution. Indeed, the Amendment provides broader protection to privacy than does the federal constitution, which, as indicated by the Supreme Court authority cited above, itself places personal documents

securely within the protected zone of privacy. City of Santa Barbara v. Adamson, 27 Cal.3d 123, 130 n.3, 164 Cal.Rptr. 539 (1980).

Thus, numerous cases have found personal documents protected by the Constitutional right of privacy. E.g., City of Santa Barbara, id. (personal and family financial documents); Burrows v. Superior Court, 13 Cal.3d 238, 118 Cal.Rptr. 166 (1974) (credit documents); Porten v. University of San Francisco, supra (educational files); Board of Trustees v. Superior Court, supra (personnel files).

Indeed, one of the specific "mischiefs" against which the Amendment was directed was "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party." White v. Davis, 13 Cal.3d 757, 775, 120 Cal.Rptr. 94 (1975). The trial court explicitly found that defendant had so abused the information given him by the Church. (App. 254).

Therefore, under settled common law doctrine and, a fortiori, under broader California Constitutional protection, plaintiff and intervenor established a prima facie case of invasion of privacy.

2. The Trial Court's Novel Justification Defense Rests on an Erroneous Interpretation of the Restatement of Torts, and Subverts the Fundamental Policies Underpinning the Right of Privacy.

The trial court, in fashioning its novel justification defense, cited a single legal authority that pertains to a claim of invasion of privacy: Section 652A of the Restatement (Second) of Torts. The court's reading of § 652A is simply erroneous. That Section states, in pertinent part, that "[t]he right of privacy is invaded by . . . unreasonable intrusion upon the seclusion of another, as stated in §652B." The trial court interpreted the word "unreasonable"

to require the application of a "balancing test, weighing the nature and extent of the invasion, as against the purported justification therefore." (App. 256). Applying this test, the court ruled that defendant's intrusion was justified by his belief that the documents would be useful in his defense of an anticipated lawsuit and in discouraging physical harassment. The trial court conceded that defendant "took voluminous materials, some of which appear only marginally relevant to his defense." But the court excused defendant because "he was not a lawyer." (App. 261).30/

The court, however, cited no case law nor any of the extensive Restatement Sections and Comments explaining the meaning of the "reasonableness" requirement. In fact, the case law--in California and in every other jurisdiction recognizing the tort of intrusion--and the Restatement itself flatly contradict the trial court's new defense. As detailed below, these authorities state in the most explicit terms that: (1) The "reasonableness" standard refers only to whether the intrusion on privacy would be offensive to the ordinary ("reasonable") person; that is, the test looks to the reasonable sensibilities of the victim and has nothing to do with the motives or interests of the intruder. (2) The courts have universally rejected defendant's argument that his unauthorized acquisition of private documents is justified by his particular motive of obtaining them for use in defending either himself or an anticipated lawsuit. (3) Tortious intrusion is never justified by the private or public interests that motivate the intruder--not even if the

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30/ Defendant repeatedly claimed, however, to be an expert on the content and meaning of the documents. Such an expert surely would have been able to limit his seizure of private documents to those "relevant to his defense." The fact that Armstrong took many more documents than "necessary" demonstrates the after-the-fact nature of the justification asserted. The truth is, as Armstrong himself admitted (R.T. 4579, 764-65, 771-72), he took the documents to assist Flynn in his litigation campaign against the Church.

intruder seeks to serve the highest constitutional values. To find controlling precedent as to each of these three propositions, the court need look no further than the leading case under California law, Dietemann v. Time, Inc., supra, which is discussed at length below.

Indeed, because the bulk of intrusion cases arise in the context of invasions of privacy aimed at securing evidence or contraband or at otherwise serving the private advantage of the defendant, it is no surprise that the courts have universally rejected a justification defense that would free potential litigants--based solely on their subjective belief--to acquire private documents by hook or by crook. It would be utterly anomalous if the protections against infringement of such a fundamental constitutional right were made contingent on the infringing party's subjective belief as to whether or not committing a violation of the right will serve his personal interests. Such a rule would explode the core interest that the right of privacy is intended to safeguard.

The trial court's novel defense would also shatter the delicately crafted judicial mechanism for accommodating the discovery goals of private litigants and the public interest in preserving the privacy of personal documents. In Valley Bank of Nevada v. Superior Court, 15 Cal.3d 652, 125 Cal.Rptr. 553 (1975), the court held that when a litigant seeks discovery of confidential information, all interested persons, including third parties, must be afforded a fair opportunity to assert their privacy interests in the information. In such cases, courts must carefully weigh several enumerated factors in determining whether discovery should be denied or whether protective orders should issue. Id. This prophylactic scheme of prior judicial review--with all the attendant safeguards of notice, opportunity to be

heard, and adjudication constrained by judicially defined standards--would be wholly subverted by the trial court's novel defenses.

The legal limits on government searches and seizures provide a powerful analogy. Law enforcement authorities, of course, may not intrude into legitimate areas of privacy without prior judicial authorization (in the form of a search warrant), even when they have objectively-based probable cause to believe that they will find evidence of crime or fraud. It is inconceivable that in California, where constitutional privacy rights apply equally against both private parties and the state, e.g., Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829 (1976), a private party could be licensed to intrude on private documents without prior judicial authorization, on the basis of the party's unilateral, subjective belief that the documents may contain mere indirect evidence of unspecified wrongdoing.

The detailed doctrinal analysis below demonstrates that, consonant with these overwhelming policy considerations, the courts have universally rejected the trial court's novel justification defense.

a. The trial court found its justification defense in the "unreasonableness" standard of Restatement § 652A(2)(a). That Section refers us to § 652B for a definition of "unreasonable intrusion." Section 652B states:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

On its face, then, the Restatement does not contemplate that the unreasonableness of an intrusion is to be measured by a balancing of interests. Rather, it

explicitly defines unreasonableness from the point of view of the victim of the intrusion. That is, the test is whether the ordinary victim of an intrusion would be highly offended. The interests or motives of the intruder are, under the Restatement, nowhere to be balanced against the offensiveness to the victim.

This plain facial meaning of § 652B is the interpretation the courts have universally given it--until, that is, the decision of the court below. E.g., Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (test is whether reasonable man would expect that defendant should be excluded form the zone of privacy); Emerson v. J.F. Shea Co., 76 Cal.App.3d 579, 592, 143 Cal.Rptr. 170 (1978) ("test is what is objectionable or offensive to the reasonable man"); Noble v. Sears, Roebuck and Co., 33 Cal.App.3d 654, 659-60, 109 Cal.Rptr. 269 (1973) (same).

b. The Restatement, in two of the illustrations to Comment b to Section 652B itself, explicitly rejects the trial court's novel rule that defendant's intrusion can be justified if the purpose of the intrusion is to obtain evidence for defense of a lawsuit:

> 2. A, a private detective seeking evidence for use in a lawsuit, rents a room in a house adjoining B's residence, and for two weeks looks into the windows of B's upstairs bedroom through a telescope taking intimate pictures with a telescopic lens. A has invaded B's privacy.
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> * * *
>
> 4. A is seeking evidence for use in a civil action he is bringing against B. He goes to the bank in which B has his personal account, exhibits a forged court order, and demands to be allowed to examine the bank's records of the account. The bank submits to the order and permits him to do so. A has invaded B's privacy. (Emphasis added)

In both these illustrations, then, an intrusion claim is established notwithstanding that the intruder was seeking evidence for use in a lawsuit against the victim.

Numerous courts, addressing fact situations similar to these Restatement illustrations, have reached the same result. In the leading case applying California law, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), the court held that defendants had no privilege to commit an intrusion upon plaintiff's privacy notwithstanding that defendants were working in tandem with the District Attorney to obtain evidence of plaintiff's alleged criminal fraud. Likewise, in Noble v. Sears Roebuck and Co., 33 Cal.App.3d 654 (1973), defendants allegedly invaded the premises of plaintiff's hospital room in order to obtain information for use in plaintiff's personal injury action against defendants. This court ruled that the alleged facts, if proved, constituted an intrusion.

Indeed, in the first American common law case on intrusion, the defendant corporation argued that it was privileged to intrude into the privacy of plaintiff's hospital room (by planting a "bug") on the ground that it was seeking evidence to defend itself against an anticipated fraudulent lawsuit by plaintiff. McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E. 2d 810, 818 (Ga.App. 1939). The Georgia court held that there was no such "justification" defense, particularly because plaintiff's anticipated lawsuit, even if fraudulent, "could not, in advance of judgment in favor of the defendant, be deemed a violation of any right of the defendant." Id. Applying these precedents from California and Georgia law, the Kansas Supreme Court rejected a defendant's similar attempt to justify his intrusive conduct. In Froelich v. Adair, 516 P.2d 993 (Kan. 1973), the defendant surreptitiously obtained a sample of plaintiff's hair for use in a defamation action. The court

held that defendant's allegedly "excusable conduct based upon gathering privileged communications in connection with a judicial proceeding is not a defense to intrusion." Id. at 997.

There are innumerable analogous cases in which defendants, seeking to acquire evidence or contraband, conducted intrusive searches. No court has found such an intrusion justified or excused by the defendants' purpose of seeking evidence or of exposing crime or fraud. E.g., Fowler v. Southern Bell, 343 F.2d 150 (5th Cir. 1965); Young v. Western & A.R. Co., 148 S.E. 414, 3d Ga.App. 761 (1929); Thompson v. City of Jacksonville, 130 So.2d 105 (Fla. App., 1961).

c. The established rule that one is not privileged to intrude into another's privacy in order to acquire evidence for litigation purposes is consonant with the broader principle that "[p]rivilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication." Dietemann, 449 F.2d at 249-50.31/ This principle rests on the distinction between the intrusion type of invasion of privacy at issue in this case--which occurs when there is any intentional interference with private information--and the three other types of invasion of privacy, which require widespread publication of private information.32/ Because a claim for intrusion does not

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31/ A defendant's dissemination of private information that he intrusively acquired - as in this case - may enhance the injury caused by the intrusion, but of course does not alter the prima facie elements of, or the defenses applicable to, the underlying intrusion claim. Dietemann, 449 F.2d at 249-50.

32/ A majority of states, including California, recognize four categories of common law invasion of privacy. These
(footnote continued)

require publication, "public interest" privileges rooted in First Amendment principles of freedom of expression are inapplicable. New York Times v. Sullivan, 376 U.S. 254 (1964) (First Amendment requires qualified privilege for defamatory publication about public figures); Time, Inc. v. Hill, 385 U.S. 374 (1967) (same First Amendment privilege applicable to publication constituting invasion of privacy). As the court stated in Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969):

> [I]n analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference. On the other hand, where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public

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include:

1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation for the defendant's advantage, of the plaintiff's name or likeness.

Lugosi v. Universal Pictures, 25 Cal.3d 813, 819, 160 Cal.Rptr. 323 (1979) (quoting Prosser, Privacy, 48 Cal.L.Rev. 383, 389 (1960)). See also, Restatement (Second) of Torts, §§ 652B-652E.

> interest should not turn on the manner in which it has been obtained. (emphasis added).

Thus, defendant here cannot win exoneration by appealing to the purported public interest in the content of the documents he took--nor, a fortiori, by appealing to his private interest in obtaining the documents for an anticipated litigation defense. Indeed, even if an intruder seeks to serve the highest constitutional values, he is not justified in intruding on another's protected sphere of privacy. In Dietemann, the Ninth Circuit, applying California law, so stated in the clearest terms:

> The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime. 449 F.2d at 249 (emphasis added).

See also Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) ("[c]rimes and torts committed in news gathering are not protected").

Thus, even if defendant in this case reasonably suspected that the purloined documents would expose frauds against the public, he was not privileged to commit a tortious intrusion.33/

33/ Even if there is a justification defense to intrusion claims, the defense is inapplicable in this case under the doctrine of "abuse of privilege." The trial court found that defendant "engaged in overkill" in that "he took voluminous materials, some of which applies only marginally relevant to his defense" of anticipated litigation. Section 605A of the Restatement (Second) of Torts--pertaining to the law of defamation but, under Sections 652F and 652G, incorporated by reference into the law of invasion of privacy--provides:

> One who upon an occasion giving rise to a

(footnote continued)

d. Assuming arguendo that the trial court's "reasonableness" defense were not undercut by universally accepted legal doctrine and principles, the court's determination that defendant's interests outweighed plaintiffs' is, in any event, erroneous under clearly established California law. Even in the context of prior judicial screening of requests to disclose private matter, "California's courts generally have concluded that the public interest in preserving confidential information outweighs in importance the interest of a private litigant...." City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 163 (1940); Board of Trustees v. Superior Court, 119 Cal.App.3d 516, 530, 174 Cal.Rptr. 160 (1981) (citing numerous cases). Thus, defendant's interest as a private litigant in acquiring documents for use in anticipated private lawsuits cannot outweigh California's constitutionally recognized public interest in preserving the right to privacy.34/

(footnote continued from previous page)
conditional privilege publishes defamatory matter concerning another that is within the privilege, abuses the privilege if he also publishes unprivileged defamatory matter.
See also Institute of Athletic Motivation v. University of Illinois, 170 Cal.Rptr. 411, 417-18, 114 Cal.App.3d 1, 12 (1982).

By making the privilege applicable only to publications that invade privacy, these sections recognize the above-discussed rule that in intrusion cases--in which publication is not an element--the various privileges applicable to publications that are defamatory or that invade privacy are inapplicable. But even if such privileges were applicable to intrusion claims, the defendant abused the privilege and lost it.

34/ It is unclear whether the trial court, in applying its justification defense against intrusion, weighed the purported threat to defendant's physical safety in the balance. To the extent that it did, the prerequisites for applying the doctrine of physical self-defense were not even
(footnote continued)

B. The Trial Court Relied On A Defense To Breaches Of Confidence And Of Fiduciary Duty That Is Inapplicable To A Case, Such As This, In Which The Agent Wrongfully Acquires Confidential Documents In The Absence Of An Emergency.

1. Plaintiff and Intervenor Established Prima Facie Cases of Breach of Fiduciary Duty and Breach of Confidence

The trial court found that plaintiff Church made out prima facie cases of breach of fiduciary duty and breach of confidence by defendant. Because of the similiarity between the elements of these two claims, this section discusses them together.35/

The source of defendant's fiduciary duty toward plaintiff lies in the court's finding that defendant "had an informal employee-employer relationship with the Church." Under California law, it is well established that "[a]n agency may be informally created," and that "the question of whether an 'agency' existed is a question of fact." Rookard v. Mexicoach, 680 F.2d 1257, 1261 (9th Cir. 1982). The court's finding of fact as to the existence of an agency relationship is thus beyond challenge on this appeal.36/ Defendant's fiduciary duty toward the Church flows, as a matter of law, from the fact of the agency relationship--for, in California, an agent owes full fiduciary duties to his

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remotely established, as discussed at length in Section I.C. of this Brief.

35/ Both claims are established by defendant's use of confidential information for unauthorized purposes. As discussed below, the claim of breach of fiduciary duty is also established by defendant's wrongful acquisition of the archives; and that wrongful acquisition defeats any privilege that defendant might otherwise claim to disseminate the documents.

36/ That finding of fact is unquestionably supported by substantial evidence on the record. See supra at 9 n. 7.

principal. Id. at 1262; see also Restatement (Second) of Agency § 13 ("agent is a fiduciary with respect to matters within the scope of his agency.")

The facts established at trial--as found by the court below--unquestionably support the court's ruling that defendant breached these fiduciary duties. Defendant manifestly used "information confidentially given him by the principal...to the injury of the principal" when he took documents from Church archives for his own use and supplied documents to known adversaries of the Church. Restatement (Second) of Agency § 395. Further, after the termination of the agency, defendant similarly used confidential information to the principal's injury and, by acquiring documents from Omar Garrison in the Spring and Summer of 1982, took "advantage of a still subsisting confidential relation created during the prior agency relation." Restatement (Second) of Agency, § 396(b), (d).

The trial court's finding that defendant used plaintiffs' confidential materials for unauthorized purposes, (App. 254), also clearly supports the court's ruling that plaintiffs established a prima facie claim of breach of confidence. See, e.g., Davies v. Krasna, 150 Cal.3d 502, 508-10 (1975); Faris v. Enberg, 97 Cal.App.3d 309 (1979); Thompson v. California Brewing Co., 150 Cal.App.2d 469, 474 (1957).

In Carpenter Foundation v. Oakes, 26 Cal.App.3d 784, 103 Cal.Rptr. 368 (1972), the court found both a breach of confidence and a breach of an agent's fiduciary duty under facts strikingly similar to those of this case. Defendant there was an adherent of the Christian Science religion and an agent of the plaintiff, which was a non-profit corporation whose function was to preserve archives of Mary Baker Eddy, the founder of Christian Science. A relationship of confidence developed over the years between defendant and

plaintiff. Plaintiff provided defendant "substantial quantities of written and printed materials of varying kinds," including "voluminous correspondence from and speeches by Mrs. Eddy, memoirs and recollections of students who knew Mrs. Eddy, essays on Christian Science, press clippings, photographs, diaries, notes, observations, pictures, poems, precepts, quarterlies, sermons, prayers and miscellaneous documents." Id. at 788.

Defendant was authorized to make the documents available only to serious students of Christian Science. Instead, he published two books consisting largely of excerpts from the documents. The court found that "defendant knew that the materials came into his hands for a limited and restricted purpose" and that, in using them for unauthorized purposes, he committed breaches of "confidence," id. at 797, and of "the requirements of a fiduciary." Id. at 791-92.

The analogy between Carpenter Foundation and this case is direct. Defendant here, as the defendant in Carpenter Foundation, came into possession of the archival material "by virtue of a relationship of agency, trust and confidence;" he received the documents with the knowledge that their authorized use was limited and specific; and he breached his fiduciary obligations by exceeding the scope of that authorized use.

2. The Justification Defense Relied On By The Trial Court is Inapplicable

The trial court ruled that defendant was privileged to breach his fiduciary duty because he reasonably believed that doing so would help him defend himself, legally and physically. The court purported to find legal authority for this defense in two sections of the Restatement (Second) of Agency--which the California courts have never cited or relied upon--and in a forty-year-old decision of the

California Court of Appeal.37/ As with the trial court's misinterpretation of the Restatement of Torts sections on intrusion, the court's reliance on selected and partial language from the Restatement of Agency neglects controlling doctrine stated in the Restatement itself and in the decisional law, and rests on a perversion of the policies underlying fiduciary and confidential obligations.

The practical implications of the court's novel defense are as anomalous and damaging in the broad area of fiduciary and confidential relations as in the area of privacy protections. It is not hyperbolic to say that permitting confidential employees to siphon the most sensitive private documents to their employer's adversaries, based on the employees' subjective assessment that it is personally advantageous, would revolutionize the conduct of daily business operations. Such a rule is particularly absurd in cases, such as this, in which the fiduciary has ample time to resort to legal process for objective determination of whatever claim he has that his personal interests are threatened by his employer's conduct.38/ As discussed below, the courts and the Restatement, recognizing the untoward policy implications of a defense as broad as

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37/ The trial court stated no rule of law and cited no legal authority affording a defense to plaintiffs' prima facie claim of breach of confidence. To the extent that the trial court intended to apply to that claim the same defenses it applied to the other claims, the defenses would fail for the same reasons discussed in connection with those claims. As discussed below, in the very specific contexts in which the courts have recognized a privilege to reveal confidences, the prerequisites for disclosure are extremely restrictive and are wholly inapplicable to this case.

38/ The undisputed absence of circumstances amounting to a "necessity" for defendant's self-help is discussed at length in Point I.C. of this Brief.

that applied by the trial court, have narrowly limited the exceptions to an agent's fiduciary and confidential duty to his principal.

The trial court relied on the general language of comment f to Section 395 of the Restatement (Second) of Agency, which essentially restates the defense stated in Restatement of 418: "An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or a third person."39/ The trial court also cited the case of Willig v. Gold, 75 Cal.App.2d 809 (1946), for the proposition that "an agent has a right or privilege to disclose his principal's dishonest acts to the party prejudicially affected by them." However, the comments and cases under the Restatement, and the court's full analysis in Willig (none of which were discussed by the trial court) establish indisputably that an agent's privilege to reveal confidential information is inapplicable to the circumstances of this case--for at least five independent reasons.

1. Comment b to Section 418 provides that "if the agent acquires things in violation of his duty of loyalty, he is subject to liability for a failure to use them for the benefit of the principal" (emphasis added). That is, the agent must prefer his principal's interests over his own in using documents he has wrongfully acquired. In this case, the facts--as found by the trial court--unquestionably

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39/ It is extremely important to note that Restatement Sections 418 and 395, comment f, are not, in fact, "restatements" of actual common law decisions, but, rather, are wholesale creations of their drafters. The Restatement appendices indicate that no actual cases--in California or elsewhere--have rested on those Sections. As discussed below, the one decision that even considered applying the defense stated in Section 418 limited it to very narrow circumstances not present in this case; and the fundamental policies of agency law--recognized in the comments to the Restatement itself--compel such limited application.

establish that defendant breached his duty of loyalty in acquiring the documents. Section 396 of the Restatement provides that "after the termination of the agency, the agent...has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation." Defendant indisputably took "advantage of a still subsisting confidential relation" when, having left the Church's employ in December 1981, he nonetheless later exploited his confidential relation with Omar Garrison in order to store and retrieve documents to be used against the interests of his former principal, the Church. Having acquired documents in clear violation of his duty of loyalty, defendant was required by Section 418, Comment b, to give preference to his principal's interests in using them.

For precisely the same reason, the trial court's reliance on Willig v. Gold, 75 Cal.App.2d 809 (1946) is erroneous. In Willig, the principal voluntarily admitted to the agent that he had defrauded a third party; and the agent then conveyed that information to the third party. The agent there thus acquired the confidential information without breach of any duty of loyalty.

2. The defenses stated in Willig and in the Restatement are inapplicable for still another reason. In this case, unlike Willig, defendant's defense rests not simply on the oral disclosure of the substance of his principal's allegedly wrongful acts. Rather, plaintiffs claim that even if defendant were privileged to report to others what he had learned as the Church's agent, he was not, in his fiduciary capacity, entitled to appropriate--and is not entitled to retain or disseminate--the Church's confidential documents. That this distinction is crucial is recognized in Restatement (Second) of Agency § 396, comment

b,[40] which addresses the most often litigated ty unlawful disclosure of confidential information, unauthorized use of customer lists:

> [A]lthough an agent cannot properly sub quently use copies of written memoranda concerning customers, which were entrusted to him or made by him for use in the principal's business,...he is normally privileged to use, in competition with the principal, the names of customers retained in his memory as the result of his work for the principal. . . . (emphasis added)

Cf. Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (even though defendants were entitled to tell others about the private information they had seen and heard in plaintiff's den, they were not entitled to disseminate photographs and recordings embodying that information).

3. The Restatement Section 418 defense is inapplicable for yet another reason, which rests on the fundamental policy interest of encouraging "great freedom of communications between the principal and the agent." Restatement of 395, comment a. That interest is of special importance in a case, such as this, in which the confidential information at stake is not simply routine commercial information, but is constitutionally protected "private" information. As discussed above, wholly apart from defendant's duties as a fiduciary, his unilateral seizure of appellant's private documents cannot be legally justified in the absence of immediate necessity. When defendant's common law fiduciary obligations are added to the privacy protections of the California constitution, the rule that defendant must show an absolute necessity for his unilateral appropriation of the documents is doubly required.[41]

40/ Section 396 addresses generally the duties of an agent after termination of the agency.

41/ While, concededly, the requirement of an immediate (footnote continued)

The only court that has ever so much as considered applying the defense stated in Restatement Section 418, rejected that defense on the precise grounds that in the absence of an "emergency" requiring "immediate action," there can be no justification for breach of fiduciary duty. Patrick v. Cochise Hotels, 259 P.2d 569, 573 (Ariz. 1953). In Patrick, the agent had a beneficial interest in a second mortgage on his principal's property. When the taxes on the property became overdue, the agent paid them with his own funds and declared the entire debt due under the acceleration clause of the second mortgage. The court ruled that the agent was not "privileged to protect interests of his own which are superior to those of the principal," because the taxes could have been paid by the principal within a week, rather than by the agent himself, without default. Id. at 572 (quoting Restatement). That is, "immediate action [was not] necessary" to protect the agent's interest in the property. Id. at 573 (emphasis added).

Similarly, in Tarasoff v. Regents, 17 Cal.3d 425, 441, 131 Cal.Rptr. 14 (1976), the court ruled that a psychiatrist, because of his special professional duties and skills, has a privilige and duty to disclose confidences only where "disclosure is necessary to avert danger to others," id. (emphasis added), and "where the risk to be averted is the danger of violent assault." Bellah v. Greenson, 81 Cal.App.3d 614, 622, 146 Cal.Rptr. 535 (1978). As discussed below in Section I.C., the trial court's findings of fact do

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necessity was not stated in the Willig case, it is important to note that that case was decided before the full flowering of California common law and constitutional law in the area of privacy and confidential interests. In any event, as discussed above, Willig did not address the requirements for permitting a fiduciary to disseminate written documents that he has wrongfully acquired--requirements that clearly must be more rigorous than in the case of oral conveyance of the substance of information rightfully acquired.

not even remotely establish the prerequisites for such a necessity privilege, even if it were applicable to one without professional skills and duties.

Thus, the "superior" interest of the agent--which triggers the Section 418 defense--clearly cannot be established by a defendant's mere subjective belief that his future personal advantage will be served. This is recognized in comment a to Section 418 itself, which states that only actual emergencies such as "illness" or "insurrection" permit an agent to breach his fiduciary duty--and, even then, only by terminating the agency, not by affirmatively damaging the principal's interests through wrongful acquisitions and/or disclosures of confidential documents.

4. The trial court's justification defense is also inapplicable because defendant's purported subjective belief was not that the documents were fruits or instrumentalities of crime or fraud, but merely that the documents might contain circumstantial, hearsay evidence from which an inference of wrongdoing might be drawn.

In Suburban Trust Co. v. Waller, 408 A.2d 758 (Md.App. 1979), the court addressed the question of whether a bank was justified in disclosing the confidences of a depositor because it believed that confidential documents contained evidence of wrongdoing. The Court noted that "the American cases" on confidentiality are highly "restrictive," permitting disclosure only on consent of the plaintiff or under court order. Id. at 763-64. The court thus rejected any defense that "would permit a bank to decide what is or is not in the public interest to disclose, and what is or is not in the best interest of the bank to disclose. That vast area of discretion, it seems to us, transmogrifies confidentiality to the point that it bears little, if any, resemblance to its original meaning." Id. at 764.

The single narrow exception to this rule is where the confidential document are "used as the instrument by which the crime itself was committed." State v. McCray, 551 P.2d 1376, 1379 (Wash. App. 1976) (emphasis added). That mere circumstantial evidence of unspecified and speculative wrongdoing may be contained in confidential documents has never been found to justify disclosure. Such expansion of the narrow privilege, as discussed above, would open a "vast area of discretion" that would "transmogrif[y] confidentiality" beyond recognition. Suburban Trust, 408 A.2d at 764.

This justification defense is even more absurd if grounded on defendant's subjective belief that some of the documents may contain evidence helpful to him or others in bringing or defending some anticipated civil lawsuit against his former principal. In the only judicial ruling in this area, the Second Circuit recently found that a former agent violated his fiduciary duty by supplying confidential information to private litigants who were adversaries of his former principal. ABKCO Music, Inc. v. Harrisongs Music Ltd., 722 F.2d 988 (2d Cir. 1983).

5. Finally, the trial court's justification defense--to the extent that it rested on defendant's purported belief that he was exposing plaintiffs' "misrepresentations" about Church doctrine and about the Church Founder's background, accomplishments, and role in the Church--required the adjudication of issues that are nonjusticiable under the First Amendment. Courts may not adjudicate such issues for the simple reason that the First Amendment bars a judicial determination of the truth or falsity of religious representations:

> The religious views espoused by respondent might seem incredible, if not preposterous, to most people. But if those doctinres are subject to trial before a jury charged with finding their truth or falsity, then the same can be

> done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

United States v. Ballard, 322 U.S. 78, 87 (1944) (emphasis added.)42/ Accordingly, the courts are not competent to entertain a claim by a member or former member of a religious organization against that organization for fraud or misrepresentation in matters of belief or practice. See Estate of Supple, 247 Cal.App.2d 410, 55 Cal.Rptr. 542 (1966), cert. denied, 389 U.S. 280 (1967). Indeed, in Founding Church of Scientology v. United States, 409 F.2d 1146, 1156 (D.C. Cir. 1969), the court ruled that the reasoning of Ballard barred judicial inquiry into alleged misrepresentations regarding the Church of Scientology's central religious practices.43/

The same constitutional defect inheres in the court's inquiry into representations about the "credentials and accomplishments" of the Church's founder. Indeed, in Ballard itself, the representations at issue were by no means

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42/ Accord, Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) ("[U]nder the First Amendment there is no such thing as a false idea."); United States v. Seeger, 380 U.S. 163, 1984 (1965) ("[t]he validity of what [the conscientious objector] believes cannot be questioned"); Founding Church of Scientology v. United States, 409 F.2d 1146, 1155 (D.C.Cir. 1969); Katz v. Superior Court, 73 Cal.App.3d 952, 987, 141 Cal.Rptr. 234, 255 (1977) (rejecting any inquiry that might lead to "investigation and questioning the validity of [a party's] faith"); Fellowship of Humanity v. County of Alameda, 315 P.2d 394, 406 (Cal.App. 1957).

43/ Even though the court below inquired only into defendant's state of mind, the court's assessment that his beliefs were reasonable necessarily trespassed on nonjusticiable terrain under the First Amendment. That is, the question whether a reasonable person would believe that Church beliefs, teachings, and myths are misrepresentations necessarily entails inquiry into the inherent credibility of such religious doctrine and assertions. Estate v. Supple, 247 Cal.App. 2d 410, 55 Cal.Rptr. 542, 545 (1966). As discussed supra, such an inquiry is constitutionally impermissible.

limited to statements about the benefits of the Ballards' religious faith and practices, per se, but included representations regarding the Ballards' past, credentials and accomplishments. See Ballard v. United States, 138 F.2d 540, 542, 543, 544 n.10 (9th Cir. 1940); Supreme Court Record at 16-17, 214-15, 590, 645-47; Tribe, American Constitutional Law, 862 (1978).

Defendant's purported belief as to Mr. Hubbard's "control" of the Church is equally nonjusticiable. The Supreme Court has flatly held that civil courts may not inquire at all into "matters of discipline, faith, internal organization or ecclesiastical rule, custom or law." Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (emphasis added). See also Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

If a mere inquiry into a church's labor relations with secular employees, see NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979), or into the costs of running schools, see Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979), is forbidden by the Establishment Clause because it might improperly tread upon religious autonomy, how much more is an inquiry of the kind required by the trial court's justification defense. Here, unlike Catholic Bishop and Surinach, that inquiry intrudes directly into one of the core ecclesiastical questions of this or any church: the nature of its relationship to its Founder. Not only the conclusion reached, Catholic Bishop, supra, but the "very process of inquiry," is forbidden under the First Amendment.

These First Amendment principles not only invalidate defendant's justification defense. They require that this court strike from the trial court's decision all

findings as to alleged misrepresentations -- as well as all of the trial court's gratuitous denunciations -- concerning the Church and its Founder.

C. The Trial Court's Application of The Doctrine of Self-Defense to Plaintiffs' Conversion Claim is Erroneous As a Matter of Law Because Defendant Neither Alleged Nor Introduced Evidence to Prove That He Was In Immediate Physical Danger When He Converted The Documents.

1. Plaintiff and Intervenor Established a Prima Facie Case of Conversion

The trial court's ruling that plaintiff and intervenor established prima facie cases of conversion is indisputably correct. Upon leaving his position as Church archivist in December 1981, defendant purloined voluminous, commercially valuable archival material. In the Spring and Summer of 1982, he gathered up these materials and turned them over to Michael Flynn and other adversaries of the Church. These facts unquestionably make out a prima facie case of conversion under California law.

It is well recognized that the unauthorized use of personal property by an agent gives rise to a cause of action for conversion.44/ See, 4 Witkin, Summary of California Law § 366; Prosser and Keeton, Torts, § 15. This principle is embodied in Restatement (Second) of Torts § 228:

> One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.

See also California Civil Code §§ 3379, 3380.

44/ The trial court made a finding of fact that defendant was an agent of the Church.

It is indisputable that defendant's appropriation of confidential and commercially valuable Church archives, his transfer of them to notorious adversaries of the Church, and his copying of them for his own use are "serious" departures from the use he was authorized to make of them. The trial court so found as a matter of fact.45/

Thus, when the Church gave formal notice by letter to defendant in May, 1982, he was under an obligation to return the documents. His failure to do so was a conversion.

2. The Doctrine of Self-Defense is Inapplicable Because Defendant Was Not in Immediate Physical Danger When He Converted The Documents

The trial court, in ruling that defendant established a defense to conversion, relied on a single legal authority applicable to that cause of action--Restatement (Second) of Torts § 261:46/

> One is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.

45/ The question whether a misuse of chattel is serious enough to constitute conversion is a question of fact. See John R. Faust, Distinction Between Conversion and Trespass to Chattel, 37 Ore. L. Rev. 256, 261 (1958). Even if the trial court had not found that defendant's misuse of the archival material was "serious" enough to constitute conversion, defendant is undoubtedly liable for trespass to chattel. Section 217(b) of the Restatement (Second) of Torts states that a trespass to chattel is committed by one who intentionally "us[es] or intermeddl[es] with a chattel in the possession of another."

46/ The trial court's Statement of Decision mis-cited this Section as § 271.

This Section is not even remotely applicable to the facts of this case. As detailed below, all pertinent sources of legal authority--the decisional law of the California courts and the United States Supreme Court; the Restatement (Second) of Torts; and leading commentators--speak unanimously in applying the doctrine of self-defense only where a defendant is faced with a present and immediate danger of physical injury. The defense is inapplicable if the apprehended danger is either past or lies in the indefinite future--even the near future. The requirement of a present and immediate assault is rooted in the most fundamental rationale of the self-defense doctrine, which is well-summarized by Prosser and Keeton:

> "The privilege of self-defense rests upon the necessity of permitting a person who is attacked to take reasonable steps to prevent harm to himself or herself, where there is no time to resort to the law." Prosser and Keeton, Torts, (5th ed. 1984) at 124. (emphasis added).

Thus, just as the specific policies underlying the torts of intrusion and breach of fiduciary duty require an immediate necessity to justify defendant's unilateral decision to invade plaintiffs' rights, so does the policy underlying the tort of conversion.

The facts of this case, as found by the trial court, establish at most that defendant feared for his safety at some indefinite future time. More particularly, defendant did not introduce a shred of evidence to prove that he apprehended present and immediate assault at the points in time pertinent to the conversion claim--in December 1981 when he took the documents from the Church; at the various points in the Spring and Summer of 1982 when he acquired them from Mr. Garrison's storage; and in May 1982, when he failed to respond to the Church's demand letter. Indeed, the protracted and ongoing nature of defendant's conversion

itself definitively contradicts any claim that he took them to defend himself against a present assault at any given point in time. Certainly, he did not face incessant assailants over a period of several months. To the contrary, there is no evidence that he faced any assailants at any time during the period he converted the documents.

a. As stated in Restatement § 261, the self-defense doctrine is a defense to conversion under the same conditions as it is a defense to assault. Thus, as stated in Comment b to Section 261, the defense obtains only when there is reasonable apprehension of immediate "confinement or a harmful or offensive contact to the actor." Comment a to Section 261 refers us to Sections 63-76 for further elaboration of the doctrine of self-defense. Comment g to Section 63 states, in turn, that the privilege "extends only to acts which are done for the purpose of protecting the actor from presently threatened aggression." (emphasis added). Similarly, Comment k to Section 63 states that the privilege exists "only when the other actually or apparently threatens an immediate attack upon" the defendant. (emphasis added). Comment k further states,

> "[T]here is no privilege to disarm another who threatens a future attack upon the actor or otherwise to disable him from carrying his purpose into effect, since there is always the chance that the other may abandon his purpose, and if he does not, that the actor will have an opportunity of repelling the attack when it becomes imminent."

The courts have uniformly followed the principles stated by Prosser and the Restatement. In the early case of Acers v. United States, 164 U.S. 388, 391 (1896), the Supreme Court upheld a jury charge on self-defense which instructed that the apprehended danger "could not be a past danger, or a danger of a future injury, but a present danger." This rule requiring a present and immediate danger of bodily injury has

been consistently followed by the California courts. E.g. People v. Flannel, 25 Cal.3d 668, 674, 160 Cal.Rptr. 84 (1979) (must be reasonable belief that "it is necessary to defend oneself from imminent peril"); Villines v. Tanerlin, 206 Cal.App.2d 448, 452 (1962) (must be reasonable belief "in an impending attack . . . or immediate damage to property"); Boyer v. Wapler, 206 Cal.App.2d 725, 727 (1962) (act must be "necessary"); People v. Cornett, 209 P.2d 647, 650 (CA 4, 1949) (act must be so "urgent and pressing" as to be "necessary"); People v. Titch, 28 Cal.App.2d 31, 44 (1938) (must be "immediate danger" of bodily harm). See also State v. Schroeder, 103 Kan. 770, 176 P. 659, 660 (1918) (fear of injury "at some future time" does not justify act of self-defense, even where other party made threats immediately before the act and there were prior assaults "a few days before" the act.) In what Prosser cites as an "excellent" review of the law of self-defense, the rule is affirmed: "The danger must be, or appear to be, pressing and urgent. A fear of danger at some future time is not sufficient.' R.M. Perkins, Self-Defense Re-Examined, 1 UCLA L. Rev. 133, 134 (1954).47/

47/ For almost identical reasons, "public necessity" and "private necessity" defenses are likewise inapplicable to this case. See Restatement (Second) of Torts §§ 262, 263. The "public necessity" defense requires that a public catastrophe be "imminent" and "impending," id. § 262, Comments b, c, that action to avert it be "necessary," id. § 262 and Appendix; and that the threatened disaster be to public health, including "conflagration, flood, earthquake, or pestilence." Id., Comment b. Thus, any claim by defendant that he sought to serve the public interest by exposing alleged wrongdoing within the Church fails even remotely to approach the kind of present public catastrophe required to invoke the public necessity defense. In any event, the trial court found only that defendant was motivated by alleged fear of generalized personal danger and of private litigation, neither of which implicates any public interest, catastrophic or non-catastrophic.

(footnote continued)

b. Moreover, even if defendant had introduced evidence showing a present and immediate assault, he introduced none to show that the means he employed were the only and necessary means of avoiding physical danger. Restatement (Second) of Torts, § 70, Comment b, states that the actor must correctly or reasonably "believe that the means which he applies are necessary to prevent the apprehended harm and not merely that they are likely to be effective in preventing it." (emphasis added). See also People v. Clark, 130 Cal.App.3d 071, 380 Cal.Rptr. 682 (1982) (only an act "which is necessary to repel an attack may be used in self-defense") (emphasis added); Boyer v. Wapler, supra (same). Certainly, no reasonable mind could believe that taking a party's documents is a certain or necessary way effectively to avoid physical harm at the hands of that party.

c. Although the trial court's reasoning is not entirely clear, the court seems to have invoked the Section 261 doctrine of self-defense on the basis of defendant's alleged fear of a lawsuit as well as his generalized fear of physical harm. Fear of potential litigation--even if the fear were reasonable--does not even remotely establish the

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(footnote continued from previous page)
The "private necessity" defense, like the doctrine of self-defense, rests on the principle that self-help is permissible only when there is "no time to resort to the law," Prosser and Keeton, Torts (5th ed. 1984) 131--that is, only under circumstances "creating the necessity for immediate action." Restatement (Second) Torts § 197, Appendix (incorporated by reference in § 263, Appendix) (emphasis added); see also People v. Roberts, 303 P.2d 72 (Calif. 1956) (immediate distress of people inside apartment creates necessity for warrantless search) (citing Restatement § 197). In any event, even if the Restatement "private necessity" privilege were applicable, it cannot defeat plaintiff's damage claim, since Section 263(2) states that defendant remains liable "for any harm caused by the exercise of the privilege."

predicate for invoking the self-defense doctrine. As the discussion above makes clear, defendant must have reasonably apprehended present and immediate bodily injury.

3. Good Faith Motives--Even if Aimed at Serving The Highest Constitutional Values--Do Not Justify Conversion

It is hornbook law--in California and other jurisdictions--that conversion "is an instance of strict liability in which care [and] good faith...will not save the defendant." Beverly Finance Co. v. American Cas. Co. of Reading, Pa., 78 Cal.Rptr. 334, 337 (1969). See also Edwards v. Jenkins, 214 Cal. 713, 721 (1932); Krusi v. Bear, Stearns & Co., 144 Cal.App.3d 664, 192 Cal.Rptr. 793, 798 (1983) (good faith, due care "may not be set up as a defense to conversion.")

In California Grape Control Board v. Boothe Fruit Co., 29 P.2d 857, 858 (Calif. 1934), defendant interposed as a defense to his conversion of plaintiff's grape crop the allegation that plaintiff intended to violate state law by allowing the grapes to wither on the vine. The court rejected the defense:

> The property belonged to [plaintiff]; [defendant] converted it. How [plaintiff] obtained it or what use it intended to make of it can be no justification for the acts of [defendant]. Property rights are not administered according to speculation as to the purpose for which the property is intended to be used.

Indeed, as quoted above at p. 42, in a leading case applying California law, the Ninth Circuit stated that even a reasonable motive serving the highest constitutional values cannot constitute a defense to conversion. Thus, even if defendant reasonably suspected that the documents at issue contained evidence of frauds or crimes that would be useful

in anticipated litigation, he was not thereby entitled to convert them--whether in the name of his private interest or of some imagined public interest.

POINT II

EVEN IF THE TRIAL COURT'S NOVEL JUSTIFICATION DEFENSES WERE VALID, THEY WOULD NOT DEFEAT PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF.

The above discussion demonstrates that the defenses relied on by the trial court are, as a matter of law, inapplicable to the circumstances of this case. Even if they were applicable, however, they would at most defeat a damage recovery and would not block plaintiffs' entitlement to injunctive relief. Summarily stated, injunctive relief remains appropriate because the harm from defendant's prima facie wrongdoing is a continuing injury, while the purported grounds for these defenses--the imminence of physical danger and the threat of a lawsuit--lapsed long ago.

It is a fundamental principle of the law of remedies that monetary damages are recoverable for the redress of past acts, while injunctive relief lies to prevent future injury. See e.g., Cal-Dak Co. v. Sav-On Drugs, Inc., 40 Cal.2d 492, 496 (1953) ("Relief by injunction operates in futuro"); Volpicelli v. Jared Sydney Torrance Memorial Hospital, 109 Cal.App.3d 242, 251, 167 Cal.Rptr. 610 (1980). The corollary of this principle is that, although an injunction will not lie against completed wrongful acts, the injured party is entitled to injunctive relief if the injury is of a continuing nature. Id.; see also California Code of Civil Procedure § 526.

For this reason, it is well established that on appeal, the right to injunctive relief depends on the circumstances prevailing "as of the date of decision by [the] appellate court." Cal-Dak Co. v. Sav-On, 40 Cal.2d at 497

(quoting American Fruit Growers v. Parker, 22 Cal.2d 513, 515, 140 P.2d 23 (1943)); see also Mallon v. City of Long Beach, 164 Cal.App.2d 178, 188 (1958). Moreover, "[w]hether a permanent injunction should issue becomes a question of law where the ultimate facts are undisputed and in such a case the appellate court may determine the issue without regard to the conclusion of the trial court." Eastern Columbia, Inc. v. Waldman, 30 Cal.2d 268, 273 (1947).

On this appeal, the undisputed facts--and the facts found by the trial court--establish conclusively (1) that plaintiffs suffer continuing harm of a kind that entitles them to injunctive relief against future injury, and (2) that, as a matter of law, the defenses invoked by the trial court lapsed long ago.

A. Plaintiffs Suffer Continuing Harm That Entitles Them to Injunctive Relief

California courts have long recognized the entitlement to injunctive relief to redress ongoing infringement of personal rights. See Orloff v. Los Angeles Trust Club, 30 Cal.2d 110 (1947). Indeed, one California appellate decision affirmed the issuance of an injunction under factual circumstances and legal claims strikingly similar to those in the instant case. As described above, in Carpenter Foundation V. Oakes, 26 Cal.App.3d 784, 103 Cal. Rptr. 368 (1972), defendant committed a breach of confidence and a breach of fiduciary duty in using confidential Christian Science archives for unauthorized purposes. The trial court had found that plaintiff was entitled to possession and "permanently enjoined defendant from producing, reproducing, publishing, distributing, advertising or disseminating any of the materials." Id. at 378. The appellate court affirmed the injunction on the ground that defendant's possession and misuse of the material constituted a "continued abuse of a relationship, born in personal

friendship, and maturing into the trust and confidence of a mutual religious commitment and program deeply shared." Id. at 377 (emphasis added).

Indeed, California courts routinely grant injunctions to prevent breaches of fiduciary duty and of confidence by former agents and others who threaten to reveal or misuse confidential information. E.g., California Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197 (1948); Greenly v. Cooper, 77 Cal.App.3d 382, 143 Cal.Rptr. 514 (1978); American Loan Corp. v. California Commercial Corp., 211 Cal.App.2d 515, 27 Cal.Rptr. 243 (1963).

The federal courts have likewise recognized that injunctive relief is essential to prevent the continuing injury that results from a defendant's continued unauthorized control over confidential information. In Krzyske v. United States, 578 F.Supp. 1366, 1368 (E.D. Mich. 1984), the court summarized a recent Supreme Court pronouncement:

> As the Supreme Court recently stated, improper disclosure of confidential information to government officials creates an ongoing injury which is exacerbated by the continuing possession of the information by those officials, United States v. Sells Engineering, Inc., ___ U.S. ___, ___, n. 6, 103 S. Ct. 3133, 3137, n. 6 (1983).

The courts have been as willing to grant injunctions in cases of intrusion as in cases of breach of confidence and fiduciary duty. "The general consensus is that any of these intrusive invasions [of privacy] can be enjoined ... if continued and threatened in the future." Note, Availability of Injunctive Relief For Invasion of Privacy, 39 Mo. L. Rev. 647, 652 (1974). For example, in Galella v. Onassis, 487 F.2d 986, 998 (2d Cir. 1973), an injunction was affirmed against a photographer who intruded --and threatened to continue intruding--on the privacy of Mrs. Onassis and her children. Similarly, in Bivens v. Six

Unknown Agents, 409 F. 2d 718, 725 (2d Cir. 1969), the court noted that "[i]njunctive relief is available to plaintiff if he can prove that he is threatened by repeated or continuing invasions of constitutional right of privacy."

B. The Purported Grounds for the Justification Defense Have Lapsed

While the injury to plaintiff and intervenor is thus a continuing one, the purported grounds for the justification defenses invoked by the trial court have lapsed. Indeed, those defenses, by definition, at most provided a temporary, emergency privilege for defendant's otherwise wrongful acts. As discussed above, the defenses rest on an immediate and present danger that requires self-help until defendant has a chance to resort to legal remedies. Even if there were any such danger at the time that defendant took the documents, he has now had ample time to resort to lawful procedures and, indeed, he did so long ago. If the defenses ever had any validity, they no longer do; and, as shown above, this court is required to determine the propriety of injunctive relief as of the time it renders its decision.

Where, as here, the principles and policies underlying a defense to monetary recovery are inapplicable to injunctive relief, the courts have not hesitated to award the latter. The most prominent examples are the various qualified and absolute immunity defenses to actions against governmental officials. Even where those defenses bar monetary recovery, plaintiffs may still be awarded injunctive relief. See, e.g., Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982). The rationale of the defense to monetary damages is to avoid retrospective penalties that may "dampen the ardor" of public officials in their "unflinching discharge of their duties." Id. at 2736. Because injunctive relief operates prospectively only, there is no such danger of retrospective penalties. Similarly, in this case, assuming that defendant

held a privilege at the time he took the documents and should, for that reason, not suffer a retrospective money "penalty", the underlying rationale for the privilege has now lapsed and he will not suffer any "deterrance" if prospective, injunctive relief is granted. See also, Carpenter v. Oakes, supra (although damage remedy inapplicable because of plaintiff's failure to make required demand, injunctive relief awarded).

To the extent that the defenses invoked by the trial court rest on the evidentiary utility of the documents in defending this litigation, those defenses provide no grounds for the court's refusal to order the return of the documents at the close of proceedings. It is well-established that even "the Government's right to seize and retain certain evidence for use at trial 'does not in itself entitle the state to its retention' after trial." United States v. Farrell, 606 F.2d 1341, 1347 (D.C. Cir. 1979) (quoting Warden v. Hayden, 387 U.S. 294, 307-08 (1967)). One federal appeals court has summarized the universally accepted rule:

> Lawful seizure of the property, of itself, may affect the timing of the return, but never the owner's right to eventual return. The district court, once its need for the property has terminated, has both the jurisdiction and the duty to return the . . . property . . . regardless and independently of the validity or invalidity of the underlying search and seizure.

United States v. Hubbard, 650 F.2d 293, 303 (D.C. Cir. 1980) (footnotes and quotation omitted). See also United States v. Palmer, 565 F.2d 1063, 1065 (9th Cir. 1977).

Thus, even if defendant lawfully "seized" the documents to defend against plaintiff's and intervenor's claims, the court has a "duty to return the . . . property."48/

POINT III

THE TRIAL COURT IMPROPERLY APPLIED THE DEFENSE OF UNCLEAN HANDS ON THE BASIS OF ALLEGED MISDEEDS THAT WERE NOT DIRECTLY RELATED TO THE RIGHTS ON WHICH PLAINTIFFS SUED

The trial court denied injunctive relief on the grounds that plaintiffs had unclean hands. (App. 251). The court cited no legal authority; and, as with the court's application of the substantive justification defenses, the court did not state which of its findings of fact provided the basis for invocation of the unclean hands doctrine. The court's ruling is erroneous on both procedural and substantive grounds. Indeed, the court's application of the unclean hands defense as to plaintiff-intervenor Mary Sue Hubbard is not even remotely tenable. The court's decision mentioned no alleged misconduct by Mrs. Hubbard that bears any relationship whatsoever to the transaction at issue.

A. The Court's Ruling Is Procedurally Erroneous

As a procedural matter, the unclean hands defense was not available to defendant at trial. That defense had been stricken on three separate occasions in pretrial proceedings, (App. 127, 147, 151); it could therefore not be raised at trial. In Stewart v. Superior Court, County of San Diego, 163 Cal. App.2d 915, 209 Cal. Rptr. 820 (1985) the court asserted that there was "nothing that would in any way authorize" the interposition at trial of a defense that had previously been rejected on pre-trial motion.

48/ The surrealist incongruity of defendant's position is worth noting: He claims the right to keep documents which he took to use to defend himself in a lawsuit. What lawsuit? A suit for return of the document!

B. The Court's Ruling Erroneously Applied The Law Of Unclean Hands

1. Plaintiffs' Alleged Misconduct Is Not Directly Related To The Right That Plaintiffs Seek To Enforce

As a matter of substantive law, the court, as noted above, failed to state which of its findings of facts underlay its invocation of the unclean hands defense. The only facts on which the trial court could conceivably have relied[49/] are, as a matter of law, insufficient to underpin that defense--because plaintiffs' alleged misconduct is not directly related to the right they seek to enforce.

The courts disfavor application of the unclean hands doctrine, which operates to deny redress to plaintiffs whose rights have been violated. E.g., Illinois Power Co. v. Latham, 303 N.E. 2d 448, 457 (Ill. App. 1973). The courts have thus narrowly limited applications of the unclean hands defense to cases in which the plaintiff's unclean conduct is "directly," "immediately," and "necessarily" related to the right he seeks to enforce. The severe limitations that have been placed on the doctrine are well-summarized in Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal.App. 2d 675, 728-29, 39 Cal.Rptr. 64 (1964) (emphasis added):

> [I]t is not every wrongful act nor even every fraud which prevents a suitor in equity from obtaining relief. The misconduct which brings the clean hands doctrine into operation must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect

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49/ These include alleged harassment of defendant by private investigators, (App. 276-77); a dispute between the Church and defendant over ownership of some photographs, (App. 275-76); alleged false charges made against defendant in a Church excommunication document, (App. 275), and alleged "abuses" and "misrepresentations" committed by the Church against Scientologists and the public. (App. 270). As discussed infra at 76ff, these facts, even if true, do not amount to the kind of willful misconduct that is the threshold requirement for application of the unclean hands doctrine.

> the equitable relations between the litigants. Accordingly, relief is not denied because the plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect the problem before the court...In Boericke v. Weise, supra, 68 Cal. App. 2d 407, 419, the court said: "Of course if a party comes into a court of equity with unclean hands relating to the transaction before the court, he will be denied relief. But in determining that issue the trial court can properly consider only whether the moving party has clean or unclean hands in relation to the matters properly before the court. The trial of the issue relating to clean hands cannot be distorted into a proceeding to try the general morals of the parties."50/

In light of these general principles limiting the applicability of the unclean hands defense, the courts have fashioned six rules which defeat any conceivable theory on which the trial court's ruling might have been based:

1. The unclean hands defense is per se inapplicable where the plaintiff's alleged dirty deeds were directed at third parties, not at the defendant. E.g., Soon v. Beckman, 44 Cal.Rptr. 190, 192 (Cal.App. 1965); Mitchell Bros. Film Group, supra; Lawler v. Gilliam, 569 F.2d 1283, 1294 n.7 (4th Cir. 1978); Lefebure Corp. v. Lefebure, Inc., 284 F. Supp. 617, 626 (E.D. La. 1968); Munzenreider & Ass., Inc. v. Daigle, 525 S.W.2d 288, 291 (Tex. App. 1975); Evangeloff v. Evangeloff, 85 N.E.2d 709, 714 (Ill. 1949); Weiss v. Mayflower Doughnut Corp., 152 N.Y. 2d 471, 474 (N.Y. 1956).

50/ These general principles have been reaffirmed many times in the courts of California, e.g., Arthur v. Davis, 126 Cal.App.3d 687, 694-95, 178 Cal.Rptr. 920 (1982), of other states, e.g. Forestiere v. Doyle, 310 A.2d 607 (Conn.Sup. 1973), and of the federal judiciary, e.g., Precision Instrument Mfg. Co. v. Automotive M.M. Co., 324 U.S. 806, 814 (1945); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979); Zukowski v. Dunton, 650 F.2d 30, 35 (4th Cir. 1981).

This black-letter doctrine itself suffices to block any application of the unclean hands defense against plaintiff-intervenor. The only two misdeeds by her even mentioned in the trial court's findings of fact are her prior conviction and her policy order regarding Church members' files. The trial court's findings in no way connect either of these deeds with defendant--nor is there any evidence on which such a finding could be based.

For the same reason, plaintiff Church's alleged "abuses" and "misrepresentations" against Scientologists and the public at large can provide no basis for application of the unclean hands defense against the Church.

2. The unclean hands defense does not defeat injunctive relief simply because plaintiff seeks enforcement of a right that was acquired illegally. More specifically, even if plaintiff's property right is the fruit or subject matter of his prior fraud, the plaintiff may still enforce that right in his present transaction with defendant. The significance of this rule for this case is that, if the unclean hands defense does not bar equitable enforcement of property rights that are the fruits of prior fraud or that are the instrumentality of crimes, it is a fortiori inapplicable to plaintiffs' action to recover property which, at worst, merely contains evidence (indeed, indirect circumstantial evidence) of prior frauds.

Thus, in Loughran v. Loughran, 292 U.S. 216, 228 (1934), the Supreme Court stated: "A person does not become an outlaw and lose all rights by doing an illegal act. Courts grant relief against present wrongs and to enforce an existing right, although the property involved was acquired by some past illegal act." (quotations and citations omitted). This principle has been applied to permit a plaintiff to enforce a property right even though he retains that right through consummation of a prior fraud. Thus, in Carman v. Athearn, 77 Cal.App.2d 585 (1947), the plaintiff fraudulently transferred property to his wife to keep it out

of the reach of his creditors. When he brought suit to enforce her agreement to reconvey a one-half interest in the property, she invoked the defense of unclean hands. The court rejected the defense on the grounds that, even though plaintiff's reacquisition of the property would be the fruit of fraud, the wife's agreement to reconvey the property was a separate transaction from his original fraudulent transfer to her. The court stated,

> The misconduct must infect the cause of action before the court....A party may have relief in connection with a transaction although his original title may have been tainted by improper conduct. These principles are well settled.

Id. at 598. See also, Seagirt Realty Corp. v. Chazanof, 246 N.Y.S.2d 613 (1963); Gravelle v. Burchette, 319 P.2d 140 (Nev. 1957); Evangeloff v. Evangeloff, 85 N.E.2d 709 (Ill. 1949); Walacavage v. Walacavage, 77 A.2d 723 (Pa. 1951); McNish v. General Credit Corp., 83 N.W.2d 1 (Neb. 1957) (fact that plaintiff purchased vehicle for use as instrumentality of crime did not disentitle him to equitable remedy against finance company).

3. Where a plaintiff seeks an injunction against a former employee's misuse of confidential information, the defendant cannot invoke the unclean hands defense on the basis of plaintiff's pattern of collateral wrongful acts against the public or the defendant himself. In Germo Mfg. Co. v. McClellan, 107 Cal.App. 532 (1930), a company sought to enjoin former employees from using confidential business information to the company's detriment. The employees claimed that the company's hands were unclean because it was fraudulently and monopolistically operated. The court rejected that defense because, no matter how illegal or immoral was the company's conduct, it was not "intimately connected" with the particular transactions at issue -- that is, the employees' breach of their fiduciary duties. Id. at 542. Likewise, in the instant case, the alleged misrepre-

sentations and abuses by plaintiffs were collateral to the particular transactions at issue -- that is, defendant's breach of his fiduciary duties as Church archivist.

Numerous courts in other jurisdictions, addressing a variety of analogous fact situations, have reached the same result as in the Germo case. E.g. Lawter International, Inc. v. Carrol, 451 N.E.2d 1338 (Ill. App. 1983) (injunction against former employees' disclosure of business secrets; no unclean hands even if plaintiff made misrepresentations to defendants); Gold Bond Stamp. Co. v. E.F. MacDonald Stamp Co., 230 N.Y.S.2d 467 (App.Div. 1962) (injunction against former employees' solicitation of plaintiff's customers; no unclean hands even if plaintiff originally obtained those customers through fraudulent means); Patient Care Services, S.C. v. Segal, 337 N.E.2d 471 (Ill. App. 1975) (corporation seeks equitable relief against defendant for breach of fiduciary duty; no unclean hands even though plaintiff committed multiple breaches of agreements with defendant); United Board & Carbon Corp. v. Britting, 160 A.2d 660 (N.J. Super. 1960) (plaintiff seeks to enjoin former employees from soliciting plaintiff's customers; no unclean hands where plaintiff had defrauded customers in violation of I.C.C. regulations); Holsinger, Theis & Co. v. Holsinger, 69 N.E.2d 360 (Ill.App. 1946) (plaintiff seeks return of confidential business information from former employees; no unclean hands even though plaintiff is no longer legitimately in the industry); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham, 658 F.2d 1098 (5th Cir. 1981) (plaintiff seeks injunction to prevent former employees from soliciting plaintiff's clients; no unclean hands even if plaintiff encourages similar breaches by its current employees).

In Agee v. Central Intelligence Agency, 500 F. Supp. 506 (D.D.C. 1980), the CIA sought an injunction against Agee's ongoing disclosures of confidential information obtained during his employment with the agency. Agee began disclosing the information--which he believed exposed

wrongdoing by the CIA--after the agency allegedly perpetrated a "litany " of wrongs against him. Id. at 508. The court rejected Agee's unclean hands defense because his breach of secrecy was a transaction distinct from the agency's alleged wrongdoing against him.

4. A defendant cannot invoke the unclean hands defense on the grounds that the purpose of his wrongdoing was to vindicate plaintiff's wrongs against him or that his wrongdoing was provoked by plaintiff's wrongdoing. In Fibreboard Paper Products v. Machinists, supra, an employee sought an injunction against tortious picketing by a union. The union asserted that the employer's hands were unclean because the picketing was provoked by the employer's fraudulent misrepresentations to union members. The court rejected the defense on the ground that the tortious picketing was a separate transaction from the employer's frauds, even if the latter motivated the former. Courts of other jurisdictions have applied the same rule. E.g., Illinois Power Company v. Latham, 303 N.E.2d 448 (Ill. App. 1973); Hansen v. Local No. 373, 55 A.2d 298 (N.J. Chanc. 1947); Kaiser Trading Co. v. Associated Metals & Mineral Corp., 321 F. Supp. 923 (N.D. Calif. 1970) (injunction against breach of contract by defendant; no unclean hands where defendant's breach was motivated by plaintiff's tortious interference with closely related contract).

Thus, defendant here cannot invoke the unclean hands defense on the grounds that his tortious conduct was provoked by, or was an effort to redress, wrongs allegedly done him by plaintiffs. Indeed, such a "self-help" argument is contrary to the logic of the unclean hands defense. That defense rests not on judicial solicitude for the interests of the defendant, but on judicial protection of the court's own integrity. Coca-Cola Co. v. Howard Johnson Co., 386 F. Supp. 330, 336 (N.D. Ga. 1974). And, "[t]he Court's integrity is compromised if its grant of relief to a party necessarily implies its approval of unlawful conduct by that party." Id.

In the instant case, the court's protection of plaintiffs' personal and property rights would in no way imply that the court approves of the alleged collateral abuses against the public and defendant. Nor would it in any way hinder defendant's opportunity to seek redress for those alleged abuses through proper legal channels. Thus, in Patient Care Services, S.C. v. Segal, supra at 481-82, the court rejected the application of the unclean hands defense against a claim of breach of fiduciary duty. The court noted that "[a]ny wrong that [the employer] may have committed against [the former employee] may be redressed by a proper suit filed by [the former employee] in court."

5. Where a plaintiff establishes wrongdoing by a defendant, the latter may not invoke the unclean hands defense on the grounds that plaintiff made other charges against defendant which were false and unfounded. See, e.g., Warner Bros., Inc. v. Gay Toys Inc., 724 F.2d 327, 334 (2d Cir. 1983) (making false criminal accusations would not defeat valid trademark claim); Maatschappij Tot Exploitatie Van Rademaker's Kuninklijke Cacao & Chocoladefadrieken v. Kosloff, 45 F.2d 94, 96 (2d Cir. 1930) (false trademark claim does not establish unclean hands that would bar valid unfair competition claims).

Thus, any claim by defendant that the Church made false charges against him cannot support an unclean hands defense against plaintiffs' valid claims for invasion of privacy, breach of confidence, breach of fiduciary duty and conversion.

6. The unclean hands defense does not bar relief to a plaintiff who attempted to gain through self-help--even unlawful self-help--that which he is entitled to gain through judicial proceedings. Poule v. Guste, 246 So.2d 353 (La.App. 1971) (plaintiff, who resorted to self-help to destroy defendant's levee, still entitled to enjoin levee, which obstructed plaintiff's drainage); Maas v. Maas' Adm'r, 255 S.W.2d 497 (Ky.App. 1953) (plaintiff, who attempted to gain

reconveyence of property through threats and intimidations, still entitled to gain reconveyence through court action). Thus, even if plaintiff harassed defendant in an effort to get back the documents at issue, plaintiff's underlying legal right to recover them is untainted.

2. Plaintiffs' Alleged Dirty Deeds Do Not Amount To The "Willful Misconduct" Required To Invoke The Unclean Hands Doctrine

The only facts on which the trial court could conceivably have relied--even if "directly" related to the right plaintiffs seek to enforce--are simply insufficient to amount to the "willful misconduct" that is the threshold requirement for application of the unclean hands doctrine. E.g., A.H. Emery Co. v. Marian Products Corp., 389 F.2d 11, 17 n.4 (2d Cir. 1968). The doctrine may not rest on "nebulous speculation or vague generalities" but only on "specific acts of willful misconduct." Sterling Oil of Oklahoma v. Pack, 287 So.2d 847, 863 (Ala. 1973). Neither "ill will existing between the parties," Horne v. Radiological Servs., 83 Misc.2d 446, 456 (N.Y.Sup.Ct. 1975), nor a plaintiff's "general morals," Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal.App.2d 675, 728-29, 39 Cal.Rptr. 64 (1964), can constitute such specific, willful misdeeds. None of the incidents alleged by defendant meet this threshold.

1. Defendant alleged that he was "harrassed" by private investigators who sought to determine what archives he had taken.51/ However, according to the unrebutted testimony of the head of the private investigating firm, his instructions from Church counsel, which he relayed to his investigators, were only lawfully to observe Mr. Armstrong, and to have no physical contact with him. (R.T. 3989). As

51/ As noted in the Statement of Facts, supra at 19 n. 19, the question of whether the private investigators in fact engaged in any harassment of defendant or whether defendant himself harassed the investigators, is far from clear on the record.

stated by Judge Learned Hand, "whenever the question has come up, it has been held that immoral conduct to be relevant [to the unclean hands doctrine], must touch and taint the plaintiff personally; that the acts of his agents, though imputed to him legally, do not impugn his conscience vicariously." Art Metal Works, Inc. v. Abraham & Strauss, 70 F.2d 641, 646 (2d Cir.) (dissenting opinion), cert. denied 293 U.S. 596 (1934), adopted as opinion of the court, 107 F.2d 944 (2d Cir.) (per curiam), cert. denied 308 U.S. 621 (1939); see also Universal Builders, Inc. v. Moon Motor Lodge, 244 A.2d 10, 13-14 (Pa. 1968) (accord). Hence, even if the investigators' deeds were dirty, they cannot, as a matter of law, soil plaintiffs' hands.

2. Defendant also pointed to a dispute between the Church and defendant over ownership of some photographs. As described in the Statement of Facts at 17-18, and as found by the trial court (App. 276-76), the "dispute" amounted to no more than a heated argument over defendant's request that the Church give him photographs which the Church possessed under a bona fide claim of rightful possession. Exhaustive research has uncovered no case in California or any other jurisdiction in which heated argument, or even verbal threats, supported a finding of unclean hands. See Maas v. Maas' Adm'r, 255 S.W.2d 497 (Ky.App. 1953) (plaintiff's threats and intimidations do not constitute unclean hands). The trial court's findings and the undisputed record thus reveal no misconduct whatever regarding the photographs--at most, they reveal "ill will...between the parties," which is insufficient to establish unclean hands. Horne, supra.

3. Defendant further pointed to a Church excommunication document that allegedly made false charges against him. Our research has uncovered no case in which the mere creation of a document or making of a statement has constituted willful misconduct for purposes of the unclean hands doctrine. In any event, as discussed supra at 75, where a plaintiff establishes wrongdoing by a defendant, the

latter may not invoke the unclean hands defense even if that plaintiff made other charges or statements directed against defendant that were false or unfounded.

4. The trial court made mention of plaintiff-intervenor's prior conviction on charges unrelated to this litigation (App. 259). There can be no unclean hands, however, where a plaintiff "has purged himself of his prior fraudulent conduct" by paying the penalty that he thereby incurred. Carman v. Athearn, 77 Cal.App.2d 585, 598 (1947). Plaintiff-intervenor served her sentence and can be penalized no further for her conduct.52/

5. Finally, the trial court referred to unspecified "abuses" and "misrepresentations" committed by the Church against Scientologists and the public at large (App. 258, 270). Such "nebulous" and "vague" generalities patently do not constitute the "specific acts of willful misconduct" required by the unclean hands doctrine. Sterling Oil, supra. To rest the unclean hands defense on such generalities is precisely to distort the trial "into a proceeding to try the general morals of the parties." Fibreboard Paper Products, supra.

52/ In any event, as discussed above, her conviction is utterly unrelated to defendant and is therefore per se irrelevant to his claim of unclean hands.

POINT IV

THE TRIAL COURT'S UNSEALING ORDER IMPROPERLY IGNORED THE OVERRIDING CONSTITUTIONAL RIGHT TO PRIVACY

A. The Trial Court's Unsealing Order Infringes The Very Right That Plaintiffs Brought Suit To Protect

Over plaintiff's strenuous objections, the trial court marked for identification and admitted into evidence plaintiffs' highly confidential and private documents. At the close of trial, the court ordered public disclosure of the documents, which, until that time, had been sealed.53/ The trial court thus transformed plaintiffs' suit to safeguard their constitutional and common law rights of privacy into an occasion for wholesale, court-sponsored infringement of those rights.

Numerous courts and commentators have inveighed against such a perverse judicial exacerbation of the very intrusion that a plaintiff seeks to remedy. In United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980), the Court of Appeals reversed a trial court's order unsealing private Church of Scientology documents. The "single most important element" in the Court of Appeal's decision was the fact that the documents had been introduced as exhibits in a hearing brought on--as in the instant case--for the very purpose of protecting defendants' constitutional and common law right of privacy. The court noted that "it would be ironic indeed if one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those [privacy] interests simply to vindicate them." Id. at 321. The court's order to continue the seal was thus

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53/ The trial court excepted certain enumerated documents from its unsealing order. (App. 252). The documents ordered unsealed included documents received in evidence and documents not received but merely marked for identification.

intended to neutralize the untoward fact that the mere "initiation of [a privacy] action itself involves the additional loss of privacy" and "normally multiplies the very effect from which relief is sought." Id. at 307 n.52 (quoting Gavison, Privacy and the Limits of the Law, 89 Yale L.J. 421, 457 (1980), and Emerson, The Right of Privacy and Freedom of the Press, 14 Harv. C.R.-C.L.L. Rev. 329, 348 (1979), respectively). See also Note, All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records, 52 Temple L.Q. 311, 344 (1974).

Indeed, for the very same reason, many courts have barred public disclosure of exhibits containing common law trade secrets that do not even rise to the level of the constitutionally protected private information at issue in this case. E.g., Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 540 n.11 (2d Cir. 1974) ("Unyielding preservation of the public trial right would...present trade secret owners with the Hobson's choice of suffering an unprosecuted theft of their secrets, or allowing a prosecuted thief to broadcast the same secrets at trial"); E.I. DuPont De Nemours Powder Co. v. Masland, 222 F. 340, 341 (E.D.Pa. 1915) ("It would, of course, be idle to the point of flat absurdity for the trial judge to compel the plaintiff to publicly disclose its [confidential] processes in the act of protecting them from disclosure"), rev'd, 214 F. 689 (3d Cir. 1915), rev'd, 244 U.S. 100, 103 (1917); Curtis, Inc. v. District Court, 526 P.2d 1335 (Col. 1974) (it "would be folly to commence a suit to protect a thing that will be lost by that suit") (barring public disclosure of trade secrets); State v. O'Neill, 78 N.W.2d 921, 923 (Wis. 1956) (if court does not safeguard confidentiality, then plaintiff would be "faced with the Hobson's choice of either making public disclosure of its trade secrets or abandoning its effort to secure judicial protection of such trade secrets").

These rulings reflect the general principle, codified in California Civil Code § 3523, that "[f]or every wrong there is a remedy." The remedy mandated by Section 3523 is a meaningful remedy. "It means a remedy in some degree commensurate with the injury inflicted." Simonoff v. Jas. H. Goodman Co. Bank, 18 Cal.App. 5, 14 (1912). Far from providing a meaningful remedy for the invasion of plaintiffs' privacy, the trial court's order permitting public disclosure of the private documents multiplies the harm.

In light of these principles, the trial court's unsealing order should be reversed, and testimony regarding the contents of the documents should be either sealed or stricken from the record. Indeed, this disposition is mandated by both the federal and state constitutional right of privacy.

B. The Federal And State Constitutional Rights of Privacy Require That The Documents Be Sealed

At the close of trial, in ordering the unsealing of highly private documents, the trial court articulated no reasons--let alone compelling state interests--that would justify such a wholesale denial of plaintiffs' state and federal constitutional rights of privacy.54/ To the extent that the trial court implicitly relied on the common law right of public access to judicial records, that reliance is erroneous. The constitutional right to privacy--particularly the heightened right to privacy under the California Constitution--overrides the common law right of public access, even if the documents were properly identified and admitted into evidence.55/

54/ The trial court's failure to articulate reasons for unsealing the documents "alone [requires] remand." United States v. Hubbard, 650 F.2d. 293, 317 (D.C. Cir. 1980).

55/ In this case, the documents were improperly received into evidence in the first place; the right of public access

(footnote continued)

In Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978), the Supreme Court explicitly ruled that the public's right of access to judicial records does not rise to constitutional dimension, but is merely a common law right--and a qualified common law right at that. While the Supreme Court later recognized a First Amendment right to attend criminal courtroom proceedings under some circumstances, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), numerous courts and commentators have stated that the Nixon rule as to judicial records remains good law. E.g.,

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to the documents is therefore diminished, wholly apart from the constitutional right of privacy. The trial court admitted the documents solely on the ground that they were relevant to defendant's state-of-mind justification defenses. Because, as discussed in Point I, supra, those defenses are invalid, the documents were irrelevant and inadmissable.

Even if the justification defenses were valid, admission of the documents was still proscribed by the privacy protections of the California and federal constitutions. Because judicial discovery and evidentiary rulings constitute "state action," there must be both a "compelling state interest" to justify the order, Britt v. Superior Court, 20 Cal.3d 844, 855, 856 n.3 (1978), and no "alternative means less intrusive" in achieving that interest. White v. Davis, 13 Cal.3d 757, 772 (1975); Gunn v. Employment Development Dep't, 94 Cal.App.3d 658 (1979) (confidential evidence as to claimant's pregnancy need not be disclosed, because doctor's certificate of good health was less intrusive means of proving whether claimant was able to work).

In this case, several other less intrusive means were available to defendant than wholesale admission of the very documents whose privacy plaintiffs sought to protect. Other witnesses and defendant himself testified to his state-of-mind without reference to the documents. See Statement of Facts at 20. The court further could have permitted defendant to testify about the documents after using them to refresh his recollection--without admitting them into evidence. The court in fact used this procedure with one set of documents (Exhibits 500-4D through 500-4I), but inexplicably refused to use this less intrusive means as to the rest of the private documents. (R.T. 4602-3).

United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 428 (5th Cir. 1981); Newman v. Graddick, 696 F.2d 796, 802-03 (11th Cir. 1983); Note, The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera, 16 Georgia Law Review 659, 692 (1982); see also Chandler v. Florida, 449 U.S. 560, 569 (1981) (implicitly reaffirming Nixon rule after Richmond).56/

It has long been recognized that the common law right of public access is not absolute, and, indeed, is overriden when the Constitutional right to privacy is implicated.57/ In Nixon v. Warner Communications, supra at 598, the Supreme Court stated:

> It is uncontested...that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and

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56/ The federal cases delineating the "common law" right of access to judicial records rest on precedents from state common law decisions. The federal and state common law standards in this area--including the standards of California common law--have consequently evolved in tandem. The discussion infra thus draws on both federal and state decisions.

57/ Because, as detailed below, the trial court's decision to unseal the documents was not dependant on observations in the courtroom, this court should not restrict its review to a narrow abuse-of-discretion standard, and can independently determine that plaintiffs' constitutional right of privacy extinguishes the weaker common law right of public access to judicial records. United States v. Criden, 648 F.2d 814, 818 (3d Cir. 1981).

> sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing. (citations omitted).

Consistent with the Supreme Court's view, numerous state courts--including California courts--have stated the general rule that judicial records must be sealed where "justice" or "public policy" so requires. Thus, in Matter of Estate of Hearst, 67 Cal.App.3d 777, 783, 136 Cal.Rptr. 821, 824 (1977) the court noted that the right of public access to judicial records is overriden by the "countervailing public policy" of avoiding results that "tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good." In Craemer v. Superior Court, 265 Cal.App.2d 216, 222, 71 Cal.Rptr. 193 (1968), the court stated that such countervailing "public policy of a state is found in its constitution, acts of the legislature, and decisions of the courts." Of course, as discussed at length above (Point I.A.), in California the right to privacy is afforded the highest constitutional protection--higher even than the protections afforded by the federal constitution--and is therefore at the heart of the "public policy" that overrides access to judicial records.

When such a constitutional right to privacy is implicated, the courts do not merely balance the right of privacy against the right of access to records. Rather, in such cases the judicial records are presumptively placed under seal. Cf. Richards v. Superior Court of Los Angeles County, 86 Cal.App.3d 265 (1978) (party producing private information through discovery is presumptively entitled to a protective order limiting disclosure only to counsel for the

other party and only for use in that litigation). Only specific, compelling state interests can overcome that presumption--and those interests must be expressly articulated by the trial court. See Britt v. Superior Court, 20 Cal.3d 844, 856 n.3 (1978); Gunn v. Employment Development Dep't, 94 Cap.App.3d 658 (1979).

In United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980), the Court of Appeals applied this analysis and reversed a trial court's order unsealing private Church of Scientology documents that had been introduced as exhibits in a suppression hearing. Indeed, the factual and legal contexts of the instant case raise even more compelling privacy and confidentiality interests, and less weighty interests in public access, than those in the Hubbard case.

In Hubbard, the court found that the decisive "generalized interest" in the privacy of the Church documents required a sealing order, particularly in light of the trial court's failure to articulate any particularized compelling reasons for disclosing specific documents. Id. at 321. In finding such a generalized interest, the court relied on several factors. As noted above, the "single most important element" was the fact that defendants in Hubbard had introduced the documents as exhibits in a proceeding whose sole purpose was to protect their constitutional and common law right of privacy. Id. The sealing order was thus intended to avoid any exacerbation of the intrusion on privacy that the defendants sought to redress.58/

58/ It is important to stress that in Hubbard, the Court of Appeals reversed the trial court's unsealing order even though the trial court properly found that defendants' right of privacy had not been violated by the original search and seizure. Hence, even if this court finds that defendant Armstrong justifiably intruded on plaintiffs' privacy in this case, reversal of the trial court's unsealing order is still mandated to prevent the additional intrusion on privacy that
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In the instant case, this "most important element" is even more compelling. Plaintiffs here made every effort to vindicate their privacy interests without doing them further damage--to the point of relying solely on defendant's testimony to establish the confidentiality of the documents, without introducing the documents into the public record. See Statement of Facts, supra at 6 n. 1. Thus, whereas in Hubbard the documents were introduced into evidence by the proponents of confidentiality, in this case the proponents opposed the introduction of the documents. Perhaps even more important, while the documents in Hubbard were lawfully seized pursuant to a judicially authorized search warrant, the documents in this case were unilaterally "seized" by a private litigant without probable cause and without prior judicial review. The intrusion on privacy is therefore more severe--and any countervailing justification for publicizing the documents is correspondingly weaker.

The other factors emphasized by the Hubbard court are likewise of heightened importance in this case. Thus, in Hubbard, the court began by emphasizing that that case did not involve access to the courtroom conduct of criminal proceedings, but only to documents introduced at a criminal hearing, id. at 317; here, not only is the sole issue one of access to documents, but of access to documents used in civil proceedings among private litigants, in which public access rights are diminished.59/ In Hubbard, the court stressed the

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judicially sanctioned public dissemination of the documents would entail. That is, even if defendant, at the time he took the documents, was privileged to invade plaintiffs' privacy in order to serve his private interests, that privilege cannot serve as the state's compelling interest to now invade plaintiffs' privacy further by a judicial order of public disclosure of the documents.

59/ Indeed, the fact that the six-week courtroom
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strength of the Church's privacy interest in its administrative files, id. at 320; in this case, the documents--which pertain to the personal affairs of the Church's founder--are even more private and confidential. In Hubbard, the court emphasized that the Church had raised timely objections to release of the documents, id. at 319; here, the entire litigation has been a tale of the Church's strenuous and timely efforts to maintain the privacy and confidentiality of the archival material. In Hubbard, the court noted that, prior to the trial court's unsealing order, the court records were not open to public access, id. at 318 n. 99; the same is true here.60/ And, the court in Hubbard referred to the "possibility of prejudice" to parties to the litigation, id. at 320-21; in this case, there is a certainty that plaintiffs will suffer irreparable harm to the personal and property interests they sought to protect, if the documents are unsealed.61/ Finally, the Hubbard court noted that public access was not justified by the fact that "the documents were evidence of crimes....Wholesale public access even of materials apparently relevant to criminal activity does not

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proceedings were otherwise open to the public diminishes the interest in public access to the private portion of the documentary evidence at issue here. See Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 462 (10th Cir. 1980).

60/ Similarly, in United States v. Mitchell, 551 F.2d 1252, 1261 (D.C. Cir. 1976), rev'd on other grounds sub nom. Nixon v. Warner, supra, the court intimated that privacy interests are heightened and public access interests diminished as to court records not yet released to the public.

61/ Thus, in U.S. v. Mouzin, 559 F.Supp. 463, 466 (C.D.Calif. 1983), the court stated that public access to court records is properly denied where there is "a 'substantial probability' that the grant of access will cause articulable harm to . . . some . . . protected right." Here, there is more than a substantial probability--there is a certainty of harm to protected personal and property rights.

allow for the safeguards of the criminal process as to what is admissable evidence and what is not." Id. at 323. This reasoning preempts any argument by defendant that the "public interest" in evidence of unspecified frauds allegedly contained in the documents justifies their disclosure.

Indeed, as noted above, it is routine for courts to seal and impound exhibits containing common law trade secrets. The most thorough review of the decisional law in this area states that "[t]he object of such safeguarding procedures is, of course, to prevent, so far as possible, the litigation designed to enforce rights in the trade secret from being itself destructive of secrecy and the value of the subject matter of the litigation." Annot. 62 A.L.R.2d 509, 513. Thus, cases in which courts have ordered that testimony and exhibits regarding business secrets be submitted in camera, sealed and impounded are legion. E.g., A.O. Smith Corp. v. Petroleum Iron Works Co., 73 F. 531, 539 n. (6th Cir. 1934) (trial and appellate records sealed); Vitro Corp. v. Hall Chemical Co., 254 F.2d 787, 788 (6th Cir. 1958) (affirming trial court order impounding transcripts, exhibits and briefs); American Dirigold Corp. v. Dirigold Metals Corp., 104 F.2d 863, 865 (6th Cir. 1939) (evidence taken in camera and sealed); Sperry Rand Corp. v. Rothlein, 241 F.Supp. 549, 566 (D.Conn. 1964) (evidence taken in camera; Memorandum of Decision impounded); E.L. Bruce Co. v. Bradley Lumber Co., 79 F.Supp. 176 (W.D.Ark. 1948) (same); Taylor Iron & Steel Co. v. Nichols, 69 A. 186, 188, 73 N.J.Eq. 684 (1908) (evidence taken in camera and sealed); American Cyanamid Co. v. Fox, 140 U.S.P.Q. 199, 203 (N.Y.Sup.Ct. 1964) (exhibits and post-trial memorandum sealed); see also Crystal Grower's Corp. v. Dobbins, 616 F.2d 458 (10th Cir. 1980) (trial court sealed evidentiary exhibits, briefs and trial

court memorandum opinion containing attorney-client confidences; appellate court also seals appellate joint appendix and briefs).

If the confidentiality of trade secrets and other privileged information under the common law is routinely protected by sealing orders, then the privacy of documents enshrined within the highest protections of the state and federal constitutions deserves no less. The trial court's unsealing order should be reversed.

POINT V

THE TRIAL COURT'S MASSIVE EVIDENTIARY ERRORS RESULTED IN A MISCARRIAGE OF JUSTICE

The trial court improperly admitted and considered evidence--massive in scope--that fits into two broad categories: (1) hearsay documents and hearsay testimony admitted, over plaintiffs' objections, solely as evidence of defendant's state of mind, but improperly considered by the trial court for their truth; (2) highly inflammatory testimony about plaintiffs that was patently irrelevant to the justification or unclean hands defenses because wholly disconnected from defendant's state of mind or conduct.

This improper and highly prejudicial evidence pervaded the entirety of the defense case, which was devoted exclusively to an attempt to establish the novel justification and unclean hands defenses discussed in Points I through III above. Because, as the trial court found, plaintiffs established prima facie cases on all four of their claims, this massive improper evidence went to the disposi-

tive issues in the case--the affirmative defenses--and therefore indisputably affected the outcome. This court should therefore remand for a new trial.62/

Section A of this Point describes the improper evidence; Section B shows that that evidence affected the outcome of the case.

A. The Court Improperly Considered Vast Amounts of Hearsay Evidence and Irrelevant Evidence

The core of defendant's case was his own testimony about his state of mind--that is, his purported belief that taking the documents would help him defend against future lawsuits or other unspecified retaliation. The bulk of his testimony consisted of the alleged impact that hearsay statements--contained in numerous documents that defendant had seen and in second-hand assertions that he had heard--had had on his subjective belief. The trial court explicitly admitted this massive body of hearsay evidence for the limited purpose of showing defendant's state of mind. Yet, as shown repeatedly in the trial court's Statement of Decision, the court in fact gave full consideration to that highly prejudicial evidence for its truth.

At the inception of defendant's testimony about the documents he had taken, the trial court explicitly ruled that the sole purpose of admitting such hearsay evidence was to show defendant's state of mind. Thus, the court stated:

> Now, it seems to me if that is the thrust of this evidence, the thrust is then why did he take certain documents? How did it relate to this belief that this would be necessary to defendant

62/ Of course, if this court rules that the justification and unclean hands defenses are inapplicable to this case (see Points I through III, supra), then retrial is only required as to the question of damages, not as to defendant's liability or the propriety of equitable relief. This court need reach the argument in this Point only if it rejects the arguments in Points I, II, and III.

himself in this lawsuit with the Scientology people as distinguished from whether something is true or not in the abstract, if you follow what I'm saying. (Emphasis supplied). (R.T. 1799).

Later, the court reemphasized the limited admissibility of the evidence:

> But what we are dealing with is what his explanation is for taking certain documents and submitting them to you. . . . we are not here to in the abstract prove the truth or falsity of certain things. (Emphasis supplied). (R.T. 1805).63/

On this basis, defendant testified to his belief that the documents showed that numerous misrepresentations had been made about Mr. Hubbard's activities and accomplishments. In all, defendant testified as to how the contents of approximately 170 separate exhibits and over 300 discrete documents affected his state-of-mind. The list of such testimony provided in the margin is only by way of example.64/

63/ Plaintiffs first raised the hearsay objection in their Motion in Limine. (App. 233). During defendant's testimony, plaintiffs repeatedly renewed their objections to the hearsay evidence. (E.g., R.T. 1845, 1964, 1980, 1983, 2046, 2061, 2062). When, at the end of trial, the documents were moved into evidence, objections were again made to each document (R.T. 4571). Of course, it was not necessary to object each time a document was offered in evidence. Where exception is taken to a certain line of evidence, a party is not required to renew the objection as to each document or answer. People v. Brooks, 88 Cal.App.3d 180, 186 (1979); People v. Antick, 15 Cal.3d 79, 95 (1975).

64/ Defendant testified to his belief that the documents showed showed "lies and misrepresentations" about Mr. Hubbard's naval career (R.T. 1837); that other naval documents indicated that Mr. Hubbard, contrary to r sentations about him made by the Church, had not b crippled and blinded at the end of World War II (that Mr. Hubbard had "faked" a hip injury at the

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b. In addition to admitting this hearsay documentary evidence, the trial court also admitted vast amounts of hearsay testimony during defendant's three full days of testifying about the history of his relationship with Scientology. Over plaintiffs' repeated objections to the hearsay evidence, the trial court, for the limited purpose of showing defendant's state-of-mind, admitted defendant's testimony about numerous inflammatory matters.65/

c. The third category of prejudicial evidence improperly considered by the trial court is a vast array of indisputably irrelevant testimony by defense witnesses. The bulk of the testimony by every defense witness consisted of a

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World War II (R.T. 1857); that Mr. Hubbard did not receive as many war medals as had been represented by the Church (R.T. 1865); that, again contrary to representations, Mr. Hubbard was not a war hero (R.T. 1876); that Mr. Hubbard suffered from "mental illness" (R.T. 1906); that Mr. Hubbard had "lied from his earliest youth all the way through and he was lying to me currently" (R.T. 1929); that Mr. Hubbard had lied about his involvement with "black magic" in the early 1950's (R.T. 1953); that Mr. Hubbard was not "mentally balanced" (R.T. 1980); that Mr. Hubbard controlled "everyone connected to him" (R.T. 1983); that although Mr. Hubbard had resigned from all formal positions within the Church of Scientology, he still controlled the organization (R.T. 1994); that Mr. Hubbard controlled Church finances (R.T. 2002); that letters from Mr. Hubbard to the FBI and the Defense Department in the mid 1950's "evidenced Mr. Hubbard's continuing paranoia" (R.T. 2032).

65/ Among such hearsay evidence was defendant's testimony that Mr. Hubbard directed that defendant be "locked up" (R.T. 1458-59); that the Church purportedly tried to prevent service of court papers on Mr. Hubbard (R.T. 1458, 1535-38); that the Church had directed supposed "intelligence" activities against Mr. Hubbard's son (R.T. 1665); that the Church had an assassination plot against a woman (this evidence was double hearsay) (R.T. 1679); that the Church had funneled money to Mr. Hubbard (R.T. 1780); that the Church conducted supposed "covert intelligence activities" (R.T. 2063); that the Church had placed LSD in people's toothpaste (R.T. 2074).

potpourrie of rumors, beliefs, and, occasionally, personal observation about assorted generalized bad conduct by plaintiffs.66/

This testimony was admitted on the theory that it provided circumstantial evidence of defendant's state of mind.67/ It was, however, indisputably irrelevant because, as plaintiff repeatedly urged at trial, there was no showing--nor even any allegation--that defendant had any

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66/ Examples, by no means exhaustive, of the irrelevant and hearsay testimony of defense witnesses are: (1) Laurel Sullivan testified as to contact with Church representatives and counsel for Mary Sue Hubbard in 1983, more than a year after the documents were sent by Mr. Armstrong to Michael Flynn, as examples of harassment by the Church (R.T. 3318-3340). (2) Ms. Sullivan also testified that money had been given to Mr. Hubbard, rather than to the Church, by foreign Scientologists. (R.T. p. 3011-14). (3) Nancy Dincalci testified about culling of Church members' files (other than defendant's) when she left the Church in 1979. (R.T. 3531-32). (4) Edward Walters, a former Scientology staff member in Las Vegas, testified during the defense case and again during surrebuttal about activities of the Nevada Church. He did not know Mr. Armstrong and had no contact with him during the time period at issue here. Nor did Mr. Armstrong have any knowledge of Mr. Walter's activities. (R.T. 3579-90). (5) Kima Douglas testified about sums of money allegedly taken out of the country by the Church without reporting it. (R.T. 4458). (6) Howard Schomer, another former Scientologists, testified about alleges abusive activities that occurred after the summer of 1982, as well as contact by the Church during the trial, in 1984. (R.T. 4498ff.).

67/ The initial objection to this testimony was made in the form of motions in limine that testimony relating to alleged bad acts of the Church and Mr. Hubbard, his supposed control over the Church, and the history of the relationship between Mr. Hubbard and the Church be excluded on relevancy grounds. (App. 231). Subsequently, objections were made within the confines of the court's ruling denying those motions.

Of course, irrelevant evidence will not support a judgment. If the evidence has no tendency to prove a material issue, it must be disregarded by the court of appeal, even in the absence of an objection. Tahoe National Bank v. Phillips 4 Cal.3d 11, 23 (1971).

knowledge of these "facts" at the time he took the documents.68/ It is axiomatic that, for purposes of a justification defense, a defendant's "reasonable belief" in the necessity of his conduct is measured only by the facts within his knowledge at the time of his conduct. E.g. Boyer v. Waples, 206 Cal.App.2d 725, 727 (1962) (justification rests on what would appear to be necessary to a reasonable person knowing what defendant knew, that is, on facts presented to defendant at time he acted). Villines v. Tomerlin, 206 Cal.App.2d 448 (1962) (evidence of plaintiff's prior acts of violence or threats admissible only if defendant establishes his knowledge of those facts at time he acted); People v. Chand, 116 Cal.App.2d 242 (1953) (same); People v. McDaniels, 70 Cal.App. 2d 207 (1945) (same).

It must be noted that in response to the massive amounts of evidence improperly admitted by the court within the three categories described above, the plaintiffs attempted to counter the obvious prejudicial impact by introducing rebuttal evidence to show that defendant's evidence was either grossly distorted or false. (R.T. 3775-4364).69/ In stark contrast to the defendant's case, however, the trial court repeatedly interrupted and even mocked the plaintiffs' witnesses (R.T. 2847, 3449, 3456, 3617, 3618, 3833, 3866, 3886, 4458, 4486, 4676).

68/ This evidence was also irrelevant to defendant's unclean hands defense. As discussed in Point III, the assorted bad acts allegedly committed by plaintiffs had no connection with the transaction at issue in this case; defense witnesses' testimony about such matters is therefore irrelevant to the unclean hands defense.

69/ As we already have noted, supra at 12 n. 11, 15 n. 14, subsequent court proceedings in other cases have shown that much of the testimony of the apostate witnesses was either false or inaccurate.

B. The Massive Bodies of Hearsay and Irrelevant Evidence Unquestionably Affected the Outcome of the Case

This court must grant a new trial if the trial court's evidentiary errors resulted in a "miscarriage of justice." Calif. Constitution Article VI, Section 13. Whether the initial trial was before a judge or a jury, there is a "miscarriage of justice" if it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." People v. Watson, 46 Cal.2d 818, 836 (1956); Estate of Kime, 144 Cal.App.3d 246, 260 (1983); 6 Witkin, Cal. Procedure (2d Ed. 1971) Appeal § 318, at 4297-98). Under the "reasonably probable" standard, the possibility of a different result may be "far from certain" but still require a new trial. Estate of Kime, supra, 144 Cal.App.3d at 260.

In the oft-quoted language of Estate of James v. Jones, 124 Cal. 653, 655 (1899):

> If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale and lost the case to the appellants. This must of necessity be the rule wherever improper evidence has been admitted which upon its face tends in any degree to affect the final conclusion of the court.

Numerous recent courts of appeal decisions have ordered new trials on the grounds that improperly admitted evidence may have "tipped the scales" against appellants. Estate of Kime, supra, 144 Cal.App.3d 246, 260 (erroneous admission of attorney-client confidences); see also Schlesinger v. Questor Corp., 153 Cal.App.3d 762, 775 (1984)

(admission of irrelevant evidence of industry custom and practice in products liability action "clearly disadvantaged plaintiff"); Wilson v. Manduca, 233 Cal.App.2d 184, 189 (1965); Weisenberg v. Thomas, 9 Cal.App.3d 961, 965 (1970) (improper admission of extrinsic evidence to interpret contract).

Further, where the record discloses multiple errors whose cumulative effect may be prejudicial, reversal is required, even if each particular error is relatively minor. See, 6 Witkin, California Procedure (2d Ed. 1971) § 324, at 4302, and cases cited therein.

In this case, there is absolutely no question that the trial court's decision was affected by the improperly considered evidence. This is shown by (1) the trial court's litany of generalized pejorative findings about plaintiffs, findings that could only be based on the inflammatory and derogatory evidence discussed above, and (2) the trial court's specific findings that relied explicitly on improper evidence.

In its Statement of Decision, the trial court asserted that the Church

> has harrassed and abused those persons not in the Church whom it perceives as enemies. The organization clearly is schizophrenic and paranoid, and this bizarre combination seems to be a reflection of its founder LRH. The evidence portrays a man who has been virtually a pathological liar when it comes to his history, background and achievements. The writings and documents in evidence additionally reflect his egoism, greed, avarice, lust for power, and vindictiveness and aggressiveness against persons perceived by him to be disloyal or hostile. At the same time it appears that he is charismatic and highly capable of motivating, organizing, controlling, manipulating, and inspiring his adherents....Obviously, he is and has

> been a very complex person, and that complexity is further reflected in his alter ego, the Church of Scientology. Notwithstanding protestations to the contrary, this court is satisfied that LRH runs the Church in all ways through the Sea Organization, his role of Commodore, and the Commodore's Messengers. (App. 258-59)

Each of these findings is based improperly upon the hearsay statements in the sealed documents and in defendant's testimony, and upon the irrelevant testimony of the other defense witnesses. It is inconceivable that the trial judge's consideration of that huge body of inflammatory evidence for its truth did not influence his rulings as to defendant's subjective state of mind and as to plaintiffs' unclean hands.

Indeed, the trial court, in upholding defendant's subjective justification defense, rested explicitly on the testimony of defense witnesses--testimony which, as discussed above, was patently irrelevant to that state-of-mind defense. The trial court found "the testimony of Gerald and Jocelyn Armstrong, Laurel Sullivan, Nancy Dincalci, Edward Walters, Omar Garrison, Kima Douglas and Howard Schomer [all defense witnesses] to be credible, extremely persuasive, and the defense of privilege or justification established and corroborated by this evidence." (App. 257).70/

The trial court's improper consideration of hearsay evidence for its truth is shown in its treatment of Exhibit AAA--referred to by the court as "GO121669"--which defendant, after leaving the Church, had obtained from his attorney. Over plaintiffs' objection, the trial court admitted the

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70/ As already noted, the trial court's comments quoted above, ring hollow in light of recent testimony revealing the untruthful and inaccurate testimony given by several of the above-named defense witnesses in the trial in this case. See supra at 12 n. 11, 15 n. 14.

hearsay document only as confirmation of defendant's state-of-mind testimony. (R.T. 2046-47). However, in its discussion of the facts adduced by defendant in support of his justification defense, the trial court twice referred to the contents of that document. (App. 260, 261). The trial court also explicitly relied on the sweeping hearsay statements contained in a report by an agency of the French government. (App. 258).71/

Thus, the trial court considered massive bodies of irrelevant and hearsay evidence. And, in ruling on the dispositive issues in the case, the trial court relied, both explicitly and implicitly, on that evidence. There is thus much more than a "reasonable probability" that the outcome was affected--there is a certainty. A new trial is required.

POINT VI

IF A RETRIAL IS REQUIRED, THIS COURT SHOULD ORDER THAT IT BE CONDUCTED BY A NEW TRIAL JUDGE

It is well established that an appellate court should order that a case be retried before a new trial judge where the first trial judge has demonstrated a "fixed" opinion about the facts, or has expressed the belief that the appellant's witnesses testified falsely. See, e.g., Keating v. Superior Court, 45 Cal.2d 440, 444 (1955) ("When a judge has stated that a party has given false testimony, even though his belief is founded on the evidence before him, he is disqualified from retrying the case.")

In Chastian v. Superior Court, 14 Cal.App.2d 97, 102-03 (1936), the court refused to

> "allow a judge who has such a definite, positive, fixed and firm belief, justifiable though it may be, to

71/ Not only are the contents of that report hearing, but the trial court explicitly ruled that if would draw no inferences from the report but was admitting the report only to show that it was among the Church archives. (R.T. 4655).

> again pass upon the issues of fact in a case where the same defendants will undoubtedly be material witnesses....It would be unfair to ask a judge under these circumstances, to again try issues of fact involving the honor, integrity, veracity of people whom he had so recently condemned and denounced.... [Petitioners] may present their defense, if any they have, to a judge who has not a fixed or settled opinion of their integrity or veracity." (quotations omitted)

See also Blackwell v. Blackwell, 190 Cal.App.2d 520, 524 (1961) (judge cannot retry case if he has demonstrated a fixed opinion as to factual issue or if he believes that material witness (is not worthy of belief).

All of the grounds for disqualification discussed in these cases are applicable here. In his Statement of Decision, Judge Breckenridge explicitly--indeed vehemently--attacks the credibility of plaintiff Mary Sue Hubbard and praises all the defense witnesses, without distinction among them, as "credible and persuasive." (App. 257). Indeed, his blanket finding that plaintiffs' witnesses testified falsely while defendants' testified truly patently rests on his "condemnation" and "denunciation" of plaintiffs. The trial court gratuitously stated, for example, that the Church is "schizophrenic" and "paranoid," that Mr. Hubbard, whom the court found to be the Church's "alter ego," is a "pathological liar," and that Mary Sue Hubbard is a "pathetic individual." (App. 258, 259). The extent of the trial court's predisposition against plaintiffs is demonstrated vividly by the court's unprecedented, wholesale adoption of defendant's pretrial statement of facts as the court's factual determination. Indeed, the trial court did not even make the effort to link defendant's adversarial pretrial rendition of the facts with the evidence actually adduced at trial.

It is unquestionable that Judge Breckenridge has "condemned and denounced" plaintiffs, that he has a "fixed and settled opinion" of the merits of the case, and that he firmly believes that plaintiffs have lied under oath. He cannot fairly sit anew as trial judge or trier of fact. If a retrial is necessary, this case should be retried by a different judge of the Superior Court.

CONCLUSION

For the reasons discussed above, this court should reverse the trial court's judgment, order entry of judgment and injunctive relief for appellants, order permanent sealing of the private documents, and remand to a new trial judge for proceedings to determine damages.

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Respectfully submitted,

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